83 - 1856

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES KENNETH SELVIDGE,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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QUESTIONS PRESENTED

1. Does the following conduct constitute such a violation of Defendant's Sixth Amendment right of confrontation as to require the reversal of his conviction:

a) The reference by the State in closing argument to the "confession" of an alleged co-conspirator, implicating Defendant, where the "confession" was not in evidence, and

b) The reading of the above "confession" to the jury, in the guise of cross-examination of a defense witness who knew nothing of the "confession", where the alleged co-conspirator was not present at trial, although he was readily available to the State, and did not testify, and where Defendant had never previously had an opportunity to cross-examine him, under oath, at any previous hearing on the subject matter, and

c) The false opening statement to the jury by the State in which the State, after stating the co-conspirator was a thief, explained his absence and failure to testify at the trial of Defendant, as being the result of his being in Florida some place, inaccessible to the State, while knowing the co-conspirator was available under the uniform law for such purpose?

2. Where the Defendant, who was charged with theft by receiving, resided in a trailer with an alleged co-conspirator, which co-conspirator made an out-of-court confession to having committed the subject burglary by himself, and therein implicated Defendant, but did not testify at Defendant's trial, is circumstantial evidence sufficient to sustain Defendant's conviction where:

a) There was no live testimony connecting Defendant to the subject crime, and

b) The comments of the State concerning the co-conspirator's confession, even though unobjected to, constituted hearsay, and under Georgia law, cannot sustain a verdict, and

c) The only other evidence of the subject crime was property from the subject burglary discovered in a shed attached to the trailer Defendant shared with the alleged co-conspirator?

3. Was Petitioner's right to due process under Section 1, of the Fourteenth Amendment to the Constitution of the United States violated by the actions of the State in the trial of theft by receiving charges, by the introduction into evidence of property not alleged to have been stolen and the sending of same out with the jury, without an appropriate charge, along with property alleged to have been stolen, and by the State's reference in closing argument to still other merchandise found at Petitioner's shared residence as being obviously stolen merchandise, when Petitioner had never been charged with any crime connected with such merchandise and no evidence was introduced at trial concerning said merchandise?

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JAMES KENNETH SELVIDGE,

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v.

STATE OF GEORGIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Georgia Supreme Court entered March 7, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Georgia Supreme Court in this case is cited as Selvidge v. The State, case #39889, ____ Ga. ____, 313 S.E.2d 84. (Appendix A). The opinions of the Georgia Court of Appeals are cited as Selvidge v. The State, Case #64723, ____ Ga. App. ____, ____ S.E. 2d ____, (Appendix B) and Selvidge v. State, 166 Ga. App. 80, 303 S.E. 2d 294 (Appendix C and D). The denial of Appellant's motion for rehearing by the Georgia Court of Appeals is Appendix D. The order of the Newton County Superior Court, denying Defendant's Motion for Judgment Notwithstanding the Verdict on Indictment #6480 is Appendix E, and its order denying Defendant's Motion

for New Trial on Indictments #6480 and #6482 is Appendix F. The sentence and judgment of the Newton County Superior Court on Indictment #6480 is Appendix G, its sentence and judgment on Indictment #6482 is Appendix H, and its directed verdict of acquittal is Appendix I.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on March 7, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States are set out in Appendix J. O.C.G.A. § 16-8-7, formerly Ga. Code, 1933 § 26-1806, is set out in Appendix K. O.C.G.A. § 24-10-92, formerly Ga, Code 1933 § 38-2003a is set out in Appendix R. West's F.S.A. § 942.01-942.06 is set out as Appendix L.

STATEMENT OF THE CASE

Petitioner was tried by a jury on three indictments for theft by receiving stolen goods in connection with three separate burglaries involving different fact situations and parties, at a consolidated trial on October 22, 1981, in the Superior Court of Newton County, Georgia, said indictments being:

a) #6481, involving goods taken from Malcolm's Grocery, during a burglary which occurred on June 12-13, 1980, Defendant being charged with receiving said goods on June 12-13, 1980. A directed verdict of acquittal on this count was granted on Defendant's motion;

b) #6482, involving goods taken from Breedlove's (Pony Express Stop and Go) on December 1-2, 1980,

Defendant being charged with receiving said goods in January, 1981. Defendant was convicted on this charge, after the Court denied Defendant's motion for directed verdict, and was sentenced to serve ten years on probation, consecutive to the sentence in #6480, and to pay a fine of $1,000.00;

c) #6480, involving goods taken from Hayes Truck and Tractor, during a burglary which occurred on December 4, 1980, Defendant being charged with receiving said goods on January 24, 1981. Defendant was convicted on this charge after the Court denied Defendant's motion for directed verdict, and was sentenced to serve ten years, the first eight to be served in confinement, with the balance on probation.

Other than the testimony of the owners of the involved businesses, and the investigating officers, the only testimony presented by the State was that of David Grant and his wife, Bella Grant. Bella Grant's testimony was consistent with that of her husband, David Grant, who testified that:

1) He and Jay Flowers had committed both the Malcolm (#6481) and Breedlove (#6482) burglaries,

2) He, Jay FLowers and Petitioner had been involved in the consumption and disposal of the goods stolen in the Malcolm and Breedlove burglaries,

3) He knew nothing about the Hayes (#6480) burglary or the goods stolen therein.

4) Jay Flowers was the half-brother of Petitioner and shared a trailer with Petitioner and had free and open access to the property.

The testimony of David Grant as is herein relevant is included as Appendix M2-3.

Jay Flowers was incarcerated in Florida at the time of the trial, was not present at the trial, was not called as a

witness by the State and did not testify at the trial and had never previously given testimony, under oath, at any hearing on the charges herein involved (Appendix M6, M43-45).

During opening statement, after having identified Jay Flowers as having been involved in the subject burglaries, the State intentionally misrepresented to the jury the reason Flowers was not present to testify live at Petitioner's trial by stating: "Flowers is some place in Florida, inaccessible to us; ____" (Appendix M1, Lines 19-20). Flowers, who had been turned over to the State of Florida, by the State of Georgia, was institutionalized in Florida at the time of Petitioner's trial and was readily available to be brought to Georgia as a witness under the Uniform Act to Secure the Attendance of Witness from without the State, codified in Georgia as O.C.G.A. § 24-10-92, formerly Ga, Code 1933 § 38-2003a (Appendix M); and codified in Florida as West's F.S.A. § 942.01-942.06, as amended (Appendix L).

During direct examination of Mrs. Pollard, the grandmother of Petitioner and Jay Flowers, defense counsel, in reference to Jay Flowers, asked her if Flowers had been sent to Florida by the Court, and she responded in the affirmative. She was then asked if Flowers had been involved in a robbery to which she responded that he had admitted it and said he was the only one that was in it. On cross-examination, the State proceeded to hold up the "confession" of Jay Flowers and, after being advised by Mrs. Pollard that she knew nothing of any statement given by Flowers, proceeded to read same to her in the guise of questioning, i.e.:

> "Q. He said he did it. All right. Did he ever tell you "how did you get the tools away? I took them to my grandmother's house and I called my brother, he

> came down there, he knows they are stolen. He had to know where they came from. Investigator Reed asked him where they came from and he came up and picked me up. I should have got more than I did. I know I left the bolt cutters, I know I left the door open, I was going to go back and try and wipe the prints off, but I didn't. I got the tools, I got two cardboard boxes and carried everything in two boxes. I carried one box at a time out of the building and my grandmother's house was only about fifty yards from the building and I hid them in the bushes and I got ahold of my brother and he came down there and picked me up and took me to his house. Where are they now? At his house, as far as I know." Did he tell you about the tools he stole?" (Appendix M9-13)

The State proceeded with this line of questioning without objection by defense counsel.

When the State attempted to introduce into evidence the confession it had just read, defense counsel objected to tis introduction on the basis that it was the confession of another and would only be admissible at the trial of the confessing party. The Court sustained the objection and the confession was never admitted into evidence (Appendix M11-12).

The State's response to Defendant's objection was "Ordinarily, I would agree. However, on direct examination the Court well remembers Mr. Strickland's witness, while under direct indicated thathe (Flowers) gave a statement to her exonerating the defendant. What this statement is introduced for, is strictly *to rebutt that statement and show prior inconsistencies.*" (Emphasis added). The Court stated: "—The direct question was what he (Flowers) told this witness, not what he told Mr. Reed.—What he told Mr. Reed doesn't rebutt what he told her. He might have told two stories." MR.

STRAUSS (District Attorney): "I think it is important for the jury to know he (Flowers) told two stories." "THE COURT: *That's not an issue in this case. This is clearly hearsay evidence.*" (Emphasis added) (Appendix M12-13).

"No motion for mistrial or to strike was made at this time by defense counsel and the Court did not take any corrective action on its own initiative to attempt to cure the damage done by the jury having heard the prejudicial hearsay comments of the prosecutor.

This line of questioning was clearly without a factual basis, as was later admitted by the District Attorney in the argument on Defendant's motion for new trial, when he stated: "There may not have been factual basis for the line of questioning." (Appendix S2). Mrs. Pollard knew nothing of the confession of Jay Flowers, and its reading by the State was improper and prejudicial and deprived Petitioner of his right of confrontation and due process under the Sixth and Fourteenth Amendments to the Constitution of the United States.

At the close of evidence, Defendant made a motion for a directed verdict of acquittal, based upon the insufficiency of the evidence, which was granted as to Malcolm (#6481) and denied as to Breedlove (#6482) and Hayes (#6480), (Appendix M14-24).

The State added to the abuse of Defendant's constitutional rights by referring in closing argument to the *confession of Flowers* which *had not been admitted into evidence* as follows:

MR. STRAUSS (District Attorney): "—he (Flowers) hadn't told her any of that stuff that you have already heard from *testimony* showed that *was confessed to Dale Reed.* The man is doing prison time, folks don't *confess* to

go to prison if they are not basically telling the truth." (Emphasis added) (Appendix M26, Lines 13-21).

During closing argument, the State referred to several items found in the shed of Selvidge's shared residence as being stolen property, when no charge had been made against any person in connection with these items, and there was no evidence offered that they had been stolen. The State argued that the presence of a parking meter, a bible and a water jug, not connected with the burglary of Malcolm, Breedlove or Hayes, was proof Petitioner was guilty of the charges for which he was being tried (Appendix M29-31). In reference to the parking meter, the State said "I asked him (Petitioner) about the parking meter,—that's obviously stolen,—he said, "You know my little brother." "We are not accusing James Selvidge of stealing it, we are accusing him of aiding or abetting or being a receiver of stolen goods. That's what he is charged with doing. By his own admission, with respect to the parking meter, he has to be a receiver of stolen goods. If he does it in one case what is he going to do in the other case?" (Appendix M29-30).

It was error to introduce into evidence the red toolbox (Exhibit 9), a pair of old bolt cutters (Exhibit 15) and a socket wrench (Exhibit 12), and a certain rifle, all items being the undisputed property of Petitioner's grandfather, Mr. J. C. Pollard, which were not identified by any victim and which were returned to him after the trial (Appendix S4-5). The jury was never instructed by the Court not to consider these items in determining Petitioner's innocence or guilt or the value of the stolen goods (Appendix M32-47).

Defendant subsequently filed his Motion for Judgment Notwithstanding the Verdict as to Hayes (#6480), based upon the insufficiency of the circumstantial evidence to

prove Petitioner's guilt beyond a reasonable doubt and to exclude every reasonable hypothesis save the guilt of the defendant, per *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which was denied by the trial court on March 25, 1982 (Appendix N, E and S7).

Defendant also filed his Motion for New Trial (Appendix N, item (f)), as to Breedlove (#6482) and Hayes (#6480) based upon numerous grounds, including the violation of Defendant's Sixth Amendment confrontation rights and his Fourteenth Amendment due process rights (Appendix N & F), which motion was argued before the trial court on March 23, 1982 (Appendix S), and was denied by the court on March 25, 1982 (Appendix F).

Each of the above issues were addressed in Defendant's appeal to the Georgia Court of Appeals (Appendix O), which affirmed the trial court in an opinion which indicated that the *Court thought Flowers had testified*, when in the Court's opinion, it stated "—(c) There was no error in allowing impeaching testimony from a statement made by the witness Flowers which was inconsistent with his in-court testimony.—" (Appendix C6). Flowers clearly had not testified (APpendix M48-50) and this was pointed out to the Georgia Court of Appeals in Defendant's Motion for Rehearing (Appendix P3). In its ruling on Defendant's, Motion for Rehearing, the Court substituted the following for the previously quoted portion of its original opinion: "—(c) There was no error in allowing impeaching testimony from a statement made by the witness Flowers made to a police officer which was inconsistent with what he reputably said to his grandmother in her in-court testimony, especially in the absence of an objection or motion to strike." (Emphasis added) (Appendix D3). The Court was still under the impression that Flowers had testified, which he had not.

Judge Carley joined Judge Banke's dissent in the Hayes ruling, but felt that "—sufficient to support appallant's conviction of that *burglary*." (Emphasis added) (Appendix D3) Petitioner was, of course, charged with theft by receiving, not burglary (Appendix T & U). The opinion of the Georgia Court of Appeals was rendered March 14, 1983 (Appendix C1-6, & D1-3).

Defendant's application to the Georgia Supreme Court on all issues (Appendix Q), was granted on the narrow issue of the necessity for corroboration of witness Grant's testimony in connection with the Breedlove (#6482) burglary, and no argument was allowed on other issues. The opinion of the Georgia Court of Appeals was modified and affirmed by the Georgia Supreme Court on March 7, 1984.

The opinion of the Georgia Court of Appeals was amended to conform with the opinion of the Georgia Supreme Court on April 13, 1984 (Appendix B1).

REASONS FOR GRANTING THE WRIT

The right to confront the witnesses used against one charged with a crime is so basic a thread in our judicial fabric, that it is essentially self-evident. The primary safeguard for one accused of a crime is the right of cross-examination. It is the best way in which the defendant can show the falsity of the testimony by which the defendant is sought to be convicted. The jury has the opportunity to scrutinize the witness, his demeanor, and his response to cross-examination, and is not subject to being fooled by the polished delivery of a professional advocate standing in as a witness.

The right of confrontation of witnesses and the limitations on the use of the confession of a co-conspirator has been affirmed and outlined by this Court in *Burton* v.

United States, 391 U.S. 123, 88 S.Ct 1620, 20 L.Ed2d 476 (1968); *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935); *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Schneble* v. *Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). *Kirby* v. *United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890, and *Pointer* v. *Texas*, 380 U.S. 414, 85 S.Ct. 1065.

The confession of one co-conspirator may not be used in the separate trial of another co-conspirator where the confessing party is not available for cross-examination and where there has been no prior opportunity for the confessor to be cross-examined, under oath, by the defendant.

The State indicates that the purpose of the reading of the confession of the absent Flowers was to "rebutt that statement (witness Pollard's) and show prior inconsistencies." (Appendix M12-13). The confession of Flowers could not rebutt the statement of witness Pollard, and there was no prior statement by witness Pollard which could be shown to be inconsistent. The prior inconsistent statement rule clearly applies to statements by the witness sought to be discredited. Where the witness knew nothing of the confession, there could be no good faith basis for pursuing the questioning of the witness about said statement while holding it in hand. *Berger* v. *United States*, supra. The tactics employed by the State in this connection are very similar to those which this Court ruled were improper in *Douglas* v. *Alabama*, supra, wherein the witness, who had claimed his fifth amendment right against self-incrimination, was read his earlier confession by the prosecutor, while holding same in hand, and with each statement being preceded by a "Let me refresh your memory"-type preamble.

In this case the preamble was "Did he tell you that" followed by the reading of an incriminating portion of Flower's confession. If, as the trial court indicated in the argument on Defendant's motion for new trial, (Appendix S9-10), it is permissable to use the confession of a non-testifying co-conspirator by simply forming questions and reading from the confession, then the confrontation rights of the defendant may be emasculated by any clever prosecutor, simply by "cross-examining" any defense witness and asking him if "he had been told"—read confession.

The State argues that Defendant has waived any objections to the use of the confession of Flowers at trial by his failure to object at trial. A personal waiver is required of a confrontation right as described in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 854 (1972), and any such waiver must be a knowing and intelligent waiver. *Johnson* v. *Zerbst*, 304 U.S. 458, 585 S.Ct. 1019, 82 L.Ed. 1461 (1938). Any waiver in this case was clearly inadvertant, as defense counsel objected to the introduction of the confession into evidence (Appendix M11, Line 20). The waiver of rights conferred or secured by the Constitution of the United States is a federal question. *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963).

In any event, the waiver argument does not address the confrontation violation the State engaged in by referring to the confession to Dale Reed (police officer), when the *confession was not admitted into evidence* and the due process violation resulting from the reference to other merchandise located in Defendant's shared residence as being obviously stolen goods, when no such evidence was tendered in that regard and the subject merchandise was not connected with either of the charges for which Defendant was being tried (Appendix M26, Lines 13-21, M29-30).

The above actions were compounded by the State advising the jury during opening statement that Flowers was a burglar and that he was not accessible to the State to testify as a witness, when in fact Flowers was available under the Uniform Act to Secure the Attendance of Witness from without the State (Appendix L & M).

The crime of theft by receiving, O.C.G.A. § 16-8-7, formerly Ga., Code 1933 § 26-1806, is described as the receiving, disposing or retaining of stolen property which one knows or should know was stolen unless possessed with the intention of restoring same to its owner (Appendix K).

Georgia law provides that unexplained possession of recently stolen goods, standing alone will not support the inference of guilty knowledge or authorize a conviction of *theft by receiving stolen property*, the charge for which Petitioner was tried, although it may be *sufficient to support a charge as the principal thief*. *Helton* v. *The State*, 134 Ga. App. 590, 215 S.E.2d 261 (April 7, 1975); *Gee* v. *The State*, 121 Ga. App. 41, 172 S.E. 2d 480, (January 21, 1970), and *Blankenship* v. *The State*, 135 Ga. App. 482, 218 S.E. 2d 157, (July 16, 1975).

The Georgia equal access rule provides that merely finding contraband on premises occupied by defendant is not sufficient to support conviction if it affirmatively appears from the evidence that persons other than defendant had equal opportunity to commit the crime. *Gee* v. *The State*, supra; *Allen* v. *The State*, 158 Ga. App. 691, 282 S.E. 2d 126 (1981); *Morris* v. *The State*, 161 Ga. App. 141, 288 S.E. 2d 102 (1982); *Mason* v. *The State*, 146 Ga. App. 675, 247 S.E. 2d 121 (1978); *Bass* v. *The State*, 140 Ga. App. 482, 218 S.E. 2d 157 (1975); *Blankenship* v. *The State*, supra, and *Mitchell* v. *The State*, 150 Ga. App. 44, 256 S.E. 2d 652 (1979).

It is undisputed that Petitioner shared a trailer with his half-brother, Jay Flowers, and that Flowers had free access to the property, including the shed attached to the trailer (Appendix M2-3; M6, Line 24-M7, Line 1). Jay Flowers did not testify at Petitioner's trial (Appendix M48-50). Neither David or Bella Grant knew anything about the Hayes (#6480) break-in (Appendix M2-3).

The evidence against Petitioner as to Hayes (#6480) was strictly circumstantial. The confession of Flowers was purely hearsay and had no probative value under Georgia law, which follows the minority view in this respect, in that hearsay which is admitted without object still cannot be considered to sustain a verdict. *McCrary* v. *The State*, 124 Ga. App. 649, 185 S.E. 2d 586 (1971), *Higgins* v. *Trentham*, 186 Ga. 264, 197 S.E. 862 (1938), and *Rabun* v. *Wynn*, 209 Ga. 80 (2), 70 S.E. 2d 745 (1952).

Where circumstantial evidence is relied upon to establish the guilt of the defendant, such evidence must establish defendant's guilt beyond a reasonable doubt and must preclude every other reasonable hypothesis save that of the guilt of the defendant. *Jackson* v. *Commonwealth of Virginia, et al.*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed 2d 560; *DePalma* v. *The State*, 225 Ga. 465, 169 S.E. 2d 465 (1969); *Myers* v. *Phillips*, 197 Ga. 536, 29 S.E. 2d 700 (1944); *Bacon* v. *The State*, 209 Ga. 261, 71 S.E. 2d 615 (1952); *Smith* v. *The State* 230 Ga. 412, 228 S.E. 2d 811 (1976); *Mims* v. *The State*, 207 Ga. 118, 60 S.E. 2d 373 (1950), and *Cawthon* v. *The State*, 119 Ga. 395, 46 S.E. 897 (1904). The State's evidence does not meet the required standards in that one very obvious hypothesis not reasonably precluded by the evidence as to Hayes (#6480) is the possibility that Jay Flowers committed the burglary alone and never received any assistance from Petitioner. Indeed, from the State's own statement it is known that Flowers initiated the Hayes (#6480) burgla-

ry, and under the law of continuance, there exists a presumption that that state which is shown to exist is presumed to continue until a different state is shown by evidence having probative value. The State has not shown by any evidence having probative value, that the goods stolen from Hayes (#6480) by Flowers, ever left his possession and came into the possession of Petitioner.

The State has failed to prove Petitioner's guilt of the crime of theft by receiving property stolen from Hayes (#6480), beyond a reasonable doubt.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment of the Georgia Supreme Court, and Petitioner's conviction as to Hayes (#6480) should be reversed because of the failure of the State to prove its case beyond a reasonable doubt, and it should be reversed as to both Hayes (#6480) and Breedlove (#6482), because of the prejudice resulting to Petitioner from the flagrant violation of Petitioner's rights of confrontation of witnesses under the Sixth Amendment, and of due process and equal protection under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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May 7, 1984

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the State of Georgia by placing three copies thereof in the United States Mail, postage prepaid, addressed to Attorney General, State of Georgia, Attn: Mr. William Hill, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334, and to Mr. John Strauss, Newton County District Attorney, Newton County Superior Courthouse, Covington, Georgia 30209. I further certify that all parties required to be served have been served.

Atlanta, Georgia, this 7th day of May, 1984.

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APPENDIX A

IN THE SUPREME COURT OF GEORGIA

39889. SELVIDGE v. THE STATE

Decided: MAR 7 1984

BELL, Justice.

Selvidge was tried on three counts of theft by receiving. The counts charged him with receiving stolen goods from, respectively, a hardware store known as Hayes Truck and Tractor, Malcolm's Grocery, and a convenience store known as Pop Breedlove's. Selvidge was granted a directed verdict on the Malcolm's Grocery count, but he was convicted on the remaining counts. Selvidge appealed, and the Court of Appeals affirmed the two convictions. *Selvidge* v. *State*, 166 Ga. App. 80 (303 SE2d 294) (1983). We granted certiorari to review a question relating solely to the Pop Breedlove's count: whether the testimony of David Grant, the burglar of Breedlove's store and the principal witness against Selvidge on the Breedlove's count, required corroboration under OCGA § 24-4-8. In answering this question, we will supplement the facts as stated by the Court of Appeals only where necessary to this opinion.

1. A basic rule of our criminal law is that in a felony case the uncorroborated testimony of an accomplice is insufficient to support a conviction. OCGA § 24-4-8; *Kesler* v. *State*, 249 Ga. 462 (2) (291 SE2d 497) (1982); *Slocum* v. *State*, 230 Ga. 762 (3) (199 SE2d 202) (1973). Applying the traditional definition of an accomplice—one who is a party to the crime, *Kilgore* v. *State*, 251 Ga. 291 (1) (a) (305 SE2d 82) (1983); *Moore* v. *State*, 240 Ga. 210 (1) (240 SE2d 68) (1977); *Ford* v. *State*, 232 Ga. 511 (7) (207 SE2d 494) (1974)—and relying upon the general rule that a thief and the receiver of the goods he has stolen are not accomplices within the meaning of OCGA § 24-4-8, see *Springer* v.

State, 102 Ga. 447 (1) (2) (30 SE 971) (1897); *Harris* v. *State*, 67 Ga. App. 446 (4) (20 SE2d 434) (1942), cited in *Selvidge*, supra, at 83; accord, *Birdsong* v. *State*, 120 Ga. 850 (1) (48 Se 329) (1904); *Storer* v. *State*, 158 Ga. App. 644 (1) (281 SE2d 642) (1981); *Bradley* v. *State*, 2 Ga. App. 622 (1) (55 SE2d 1064) (1907); contra, *Roberts* v. *State*, 55 Ga. 220 (1) (1875), the Court of Appeals found that Selvidge and Grant were not accomplices. Accordingly, the court concluded that Grant's testimony as to Selvidge's participation in the crime of receiving stolen goods from Breedlove's store did not have to be corroborated. *Selvidge* v. *State*, 166 Ga. at 82-83. We disagree with the court's conclusion that Grant and Selvidge were not accomplices; however, we uphold the court's affirmance of Selvidge's conviction on the Breedlove's count because we find that sufficient corroboration existed.

Although we agree that the general rule is that a thief and his receiver are not accomplices within the meaning of OCGA § 24-4-8, we find that, in light of the evil which § 24-4-8 is designed to remedy, an exception to this general rule is justified where there is evidence that the thief and the receiver have engaged in a common criminal enterprise. See 53 ALR2d, 817, 838-846; Wilson v. Commonwealth, 75 SW2d 202 (Ky. 1934); People v. Lima, 154 P2d 698 (Cal. 1944). The corroboration requirement of OCGA § 24-4-8 is based upon the concern that an accomplice, due to motives such as a hope or promise of leniency or immunity, may perjure himself to aid the state in procuring the conviction of others. 7 Wigmore on Evidence, § 2057 at 322 (3rd Ed. 1940); 30 Am.Jur. 2d, Evidence, § 1148; *Coleman* v. *State*, 227 Ga. 769 (1) (183 SE2d 379) (1971). In cases where the thief and his receiver have acted pursuant to a common criminal enterprise and one or both are testifying against the other, the opportunity and motives for perjury which present themselves are essentially the same as those in criminal prosecutions involving the traditional forms of accomplices, and the testimony should be afforded the same measure of distrust.

For this reason, we now hold that, if a thief and a receiver of the stolen goods have acted pursuant to a common criminal

enterprise, they are to be considered accomplices within the meaning of OCGA § 24-4-8. Accordingly, the Court of Appeals' decision in the instant case and the other cases cited above which have held that the thief and receiver are not accomplices of each other are hereby disapproved to the extent they are inconsistent with this opinion. We emphasize, however, that many cases involving a thief and a receiver of stolen goods will fall outside the ambit of the above exception, in that there will have been no connection between the thief and the receiver other than the passing of stolen goods from one to the other. In those instances, the thief and receiver are not accomplices, and no corroboration is necessary.

In the instant case, there is some evidence that Grant and Selvidge were involved in a common criminal enterprise. There was evidence that Selvidge drove Grant and Flowers to Breedlove's, where he dropped them off and left the scene. Grant's testimony shows that, when Selvidge returned close to midnight and picked them up in front of the store, they loaded goods stolen from Breedlove's into Selvidge's car. Moreover, the record shows that Grant, Selvidge, and Flowers aided each other in transporting the goods to Selvidge's trailer and in consuming and disposing of the stolen goods. Under these circumstances, we find that Grant should be considered an accomplice of Selvidge for the purposes of the evidentiary rule of OCGA § 24-4-8.

It being determined that Grant was an accomplice of Selvidge, it follows that his testimony as to Selvidge's identity and participation in the crime of receiving stolen goods had to be corroborated, and that that corroboration had to be independent of Grant's testimony. *Kesler* v. *State*, 249 Ga. at 465-466; *Milton* v. *State*, 248 Ga. 192 (2) (282 SE2d 90) (1981). The sufficiency of corroborating evidence is peculiarly a matter for the jury to determine, and slight evidence, which may be circumstantial, connecting the defendant with the crime is sufficient corroboration. *Kesler* v. *State*, 249 Ga. at 466; *Meeker* v. *State*, 249 Ga. 780 (3) (294 SE2d 479) (1982).

In the instant case, we find that there was sufficient independent evidence corroborating Grant's testimony. First, the two walkie-talkies found at Selvidge's mobile home were identified by Ms. Breedlove as the ones stolen during the burglary. She testified that a chipped corner near the battery compartment of one walkie-talkie, and slightly bent and broken antennas on both, identified the walkie-talkies as the ones stolen from the store. Although Selvidge offered an explanation that he thought the walkie-talkies were left at the trailer by his brother or grandparents, the jury was authorized to resolve this conflicting evidence against Selvidge. See *Ladson* v. *State*, 248 Ga. 470 (5) (285 SE2d 507) (1981); *Rowland* v. *State*, 141 Ga. App. 643 (234 SE2d 183) (1977). Most importantly, testimony of Bella Grant, David's wife, connected Selvidge to the crime of theft by receiving. The Breedlove's burglary occurred during the late evening hours of December 1, 1980, and the early morning hours of December 2, 1980. Bella Grant testified that one night in early December of 1980, David, Flowers, and Selvidge drove off leaving her at Selvidge's trailer. She testified that the three men came back around midnight and carried a lot of beer and foodstuffs into the trailer. We find that the above evidence constitutes sufficient independent corroboration of David Grant's testimony as to Selvidge's participation in the crime of receiving goods stolen from Breedlove's store.

Accordingly, although we disagree with the Court of Appeals' holding that Grant's testimony did not have to be corroborated, we uphold its affirmance of Selvidge's conviction on the Breedlove's count because of our finding that Grant's testimony was sufficiently corroborated.

Judgment affirmed. All the Justices concur.

APPENDIX B

64723. SELVIDGE v. THE STATE (Ba-174 to Bi)

SEPTEMBER, 1982
AFFIRMED_____

BIRDSONG, Judge.

Our judgment in *Selvidge* v. *State*, 166 Ga. App. 80 (303 SE2d 294) has been affirmed by the Supreme Court in *Selvidge* v. *State*, Ga. (Case No. 39889, decided March 7, 1984). However, that portion of our opinion holding that a thief and a receiver of the goods stolen are not considered to be accomplices thus obviating any necessity for the corroboration of an accomplice's testimony has been overruled, as have been the earlier decisions to that effect.

We hereby adopt the reasoning and judgment of the Supreme Court holding that where a thief and a receiver of stolen property have acted pursuant to a common criminal enterprise, they are considered to be accomplices within the meaning of OCGA § 24-4-8 and the accomplice's testimony requires some corroboration.

For the reasons stated in our original opinion as modified by the Supreme Court, the judgment of conviction and sentence in this case are affirmed.

Judgment affirmed. McMurray, C. J., Deen, P. J., Quillian, P. J., and Banke, P. J., Carley, Sognier, and Pope, JJ., concur. Benham, J., not participating.

APPENDIX C

64723. SELVIDGE v. THE STATE (Ba-174 to Bi)

MAR 14 1983

SEPTEMBER, 1982
AFFIRMED

BIRDSONG, Judge.

The appellant was tried on three separate indictments, each charging him with theft by receiving stolen property with a value of more than $200. The trial court granted his motion for verdict of acquittal on the second indictment, and the jury found him guilty on the other two. This appeal is from the denial of his motion for new trial.

The first indictment charged the appellant with receiving property stolen from a hardware store known as Hayes Truck and Tractor, the second with receiving property stolen from Malcolm's Grocery, and the third with receiving property stolen from a convenience store known as Pop Breedlove's. David Grant testified that in June of 1980, he and Jay Mitchell Flowers, the appellants' half brother, burglarized Malcolm's grocery and carried the bulk of the loot (mostly beer, wine, cigarettes, and groceries) to the appellant's trailer, where Flowers and the appellant were both living at the time. Grant testified that the appellant was present when they unloaded the goods and that they told him the property had been stolen. The trial court directed a verdict in the appellant's favor on this indictment for the stated reason that there was no evidence to corroborate Grant's testimony.

With regard to the burglary of Pop Breedlove's store, Grant testified that he and Flowers had committed this offense with the appellant's direct assistance in driving them to the scene and back, and there was evidence that two walkie-talkies stolen from the store were later discovered during a search of the appellant's trailer. Grant testified that he had seen these

walkie-talkies on the appellant's premises subsequent to the night of the burglary but that each time they were outside the trailer and in Flower's possession. The appellant admitted knowing the walkie-talkies were in the trailer but stated that he believed they belonged to his two brother and/or his grandfather. Appellant supported this explanation by the testimony of both his grandparents to the effect that the grandmother had previously purchased at least three walkie-talkies of the same brand as gifts for her husband and her other two grandsons.

With regard to the Hayes Truck and Tractor burglary, the evidence established that tools similar in quantity, quality and appearance to those stolen from the establishment were seized from a storage shed adjoining the appellant's trailer during the execution of the same search which led to the seizure of the walkie-talkies. The appellant testified that he did not know the tools were there and that Flowers also had access to the shet. He denied having participated in any of the burglaries or having been present when any of the merchandise referred to by Grant was brought to his home. *Held:*

1. A summary of the evidence indicates that David Grant and Jay Flowers committeed a burglary of Malcolm's grocery stealing primarily foodstuff. Half the stolen goods were taken to Grant's residence and the other half take to Selvidge's trailer where Flowers lived with Selvidge. Grant testified that Selvidge watched the stolen groceries brought into the trailer and stored. Thereafter, the foodstuff was all consumed and none was found on the premises. Therefore, the only evidence connecting Selvidge to the burglary of Malcolm's store and the receipt of the fruits of that burglary was the uncorroborated testimony of Grant. Thus, though the grant of directed verdict of acquittal as to that count was proper, the evidence of Selvidge's knowledge that Grant and Flowers were engaged in acts of burglary and that he received the products of their misdeeds was a factor to be weighed by the jury in the other counts.

As to the burglary of Pop Breedlove's store, accepting the story of Grant, he testified that only he and Jay Flowers discussed a burglary. There is not even a scintilla of evidence that they ever mentioned their plans to Selvidge. Though Selvidge drove Grant and Flowers to a point near Breedlove's store and let the two youths out, Selvidge then drove on to Manchester, apparently nearby. After the burglary was completed, Flowers walked on into Manchester to get Selvidge. Thus there appeared to be no agreement for Selvidge to pick them up. Grant testified that when they got out of the car, he (Grant) did not know how they (Flowers and Grant) were going to get the stolen foodstuff and beer back home. Again there is no evidence that Selvidge was even aware of the plans except for a statement apparently made by Selvidge when he got back to the roadside near Breedlove's: "Did you get all you wanted?" It was only after the three returned home that Grant saw the walkie-talkies. These were clearly identified as being the ones taken in the burglary and not only were they found at Selvidge's trailier but Selvidge admitted possessing them. Though he gave an explanation (that he thought they were walkie-talkies purchased by his grandmother for members of his family), this was a question of fact for the jury.

The evidence of Selvidge's driving to and from the point of the burglary points to nothing more than mere presence. Grant's testimony shows that Selvidge simply was transporting the burglars to a place close to the burgled store for he left them off and drove on to Manchester. Grant had no idea how he was going to get back home which wholly belies any agreement or understanding by Selvidge that a burglary was going to take place or that he was a party to it. Selvidge's question after the burglary, "Did you get all you wanted?" is fully consistent with knowingly receiving stolen property and at best raises a bare suspicion that he was a party to the burglary. In my opinion, this excludes any guilt of Selvidge as to the crime of burglary. If Selvidge was not a party to the burglary, then he was not an accomplice to the crime of burglary or theft by taking. Moreover, Grant could not be an accomplice to the crime of receiving the property he had stolen; therefore, his testimony would not

be excludable as an accomplice in relation to Selvidge's receipt or knowledge. Se *Springer* v. *State*, 102 Ga. 447 (30 SE 971); *Harris* v. *State*, 67 Ga. App. 446, 447 (4) (20 SE2d 434). The cases of *Patterson* v. *State*, 109 Ga. App. 582 (137 SE2d 74) and *Goodbread* v. *State*, 29 Ga. App. 195 (115 SE 44), cited in the dissent, both deal with situations where the defendant was directly or indirectly involved in the theft (and was charged with the theft—not receiving stolen property). In each of those cases, the testimony of a co-accomplice needed corroboration, a fact not present in the instant case. In fact, the *Goodbread* case, supra, at p. 199, holds: "Granting that George Ponder, who did not participate in the burglary, was guilty of receiving stolen goods, he was not an accomplice of the principal thief." Grant's testimony was sufficient to warrant conviction.

As to the burglary of Hayes Truck & Tractor, Grant was unable to shed much light on that crime. However, the evidence clearly demonstrated that Selvidge was the owner of the trailer and the property upon which the shed was located. Though Flowers lived with Selvidge, there is no indication that Flowers had any proprietary interest in any of the buildings or land. Thus the inference of possession flowing from ownership supports the finding of receiving the stolen tools located at the shed by Selvidge. See *Cleveland* v. *State*, 155 Ga. App. 267 (270 SE2d 687). See also *Jarrard* v. *State*, 163 Ga. App. 99 (SE2d).

In both *Gee* v. *State*, 121 Ga. App. 41 (172 SE2d 480) and *Blankenship* v. *State*, 135 Ga. App. 482 (218 SE2d 157), cited by the appellant, sole proprietorship was not shown. Thus the rule of equal access had relevance. In this case, the mere presence of Flowers on the premises does not establish that he had the right of equal access to the shed with Selvidge. The sole proprietor of the premises (Selvidge) is charged with knowledge of and possession of the stolen property which equally authorizes a finding by the jury of receipt of stolen property. Taken together with his apparent knowledge of other burglaries and his possession of the stolen property, this warranted conviction of receiving the property stolen from the Hayes

Truck & Tractor business. See *Galloway* v. *State*, 157 Ga. App. 85, 87 (2) (276 SE2d 135).

2. Appellant complains that there was insufficient evidence of value of the items stolen to support a felony sentence. We disagree. The victims were merchants engaged in the business of buying and selling merchandise such as that stolen. There was testimony offered, without objection that the loss in the Breedlove burglary was in an amount of almost $1,000 and in the Hayes case that tools of a value of over $1,300 were taken. The items in the Breedlove burglary were placed in the possession of Selvidge by the testimony of Grant. The tools taken from Hayes reasonably were identified as being the same type and kind stolen, and subsequently found in a shed under Selvidge's proprietary control. We conclude this is minimally sufficient, at the least, to support possession of stolen property (and also of receiving same) of a value of $200 or more so as to support a felony sentence. *Lee* v. *State*, 162 Ga. App. 259, 261 (3) (290 SE2d 307). Moreover, the evidence as to value was received without objection and could not be raised after conviction either on a motion for new trial or in this court. *Hart* v. *State*, 227 Ga. 171 (179 SE2d 346); *Moore* v. *State*, 138 Ga. App. 902 (2) (227 SE2d 809).

3. The remaining enumerations of error have all carefully been examined.

(a) There is sufficient circumstantial evidence, as supported by other direct evidence, to warrant a jury finding of guilt beyond a reasonable doubt.

(b) We are satisfied beyond a reasonable doubt that the victim Hayes sufficiently identified the tools recovered from selvidge's out building as being his and the ones taken from his store.

(c) There was no error in allowing impeaching testimony from a statement made by the witness Flowers which was inconsistent with his in-court testimony.

(d) We find no merit, either, in any of the other numerus asserted errors raised by the appellant.

Judgment affirmed. Quillian, P. J. McMurray, P. J., Sognier, and Pope, JJ., concur. Shulman, C. J., and Deen, P. J., concur in judgment only. Carley, J., concurs in part and dissents in part. Banke, J., dissents.

64723. SELVIDGE v. THE STATE. (Ba-174 to Bi).

BANKE, Judge, dissenting.

1. The majority is simply incorrect in its conclusion that Grant's testimony evidences no prior awareness by the appellant of the plan to burglarize Pop Breedlove's store. Grant testified that after he and Flowers planned the burglary, Flowers spoke with the appellant, and the appellant then drove the two of them to the store. All of this took place in the middle of the night, and Grant stated that he left the appellant's vehicle carrying a crowbar. Although it is true Grant testified that initially he did not know how he and Flowers were going to get back with the loot, the majority neglects to mention that Grant also said he asked Flowers about this problem, and Flowers told him the appellant was coming back for them. Grant further testified that after the burglary was completed, the appellant drove back to the vicinity of the store, cut his headlights, asked if they had gotten everything they wanted, and waited while they loaded the vehicle with the stolen property.

I do not comprehend how this testimony can be characterized as evidencing no participation by the appellant in the commission of the burglary. Rather, I believe that Grant directly implicated the appellant as an accomplice to the burglary and that Grant's testimony must consequently be corroborated in order to support the appellant's conviction for receiving property stolen in that burglary. See generally OCGA § 24-4-8. Accord *Patterson* v. *State*, 109 Ga. App. 582 (137 SE2d 74) (1964). Compare *Harris* v. *State*, 67 Ga. App. 446 (4) (20 SE2d 434) (1942); *Goodbread* v. *State*, 29 Ga. App. 195 (5) (115 SE 44) (1922).

Aside from Grant's testimony, the only evidence connecting the appellant to the property stolen from Pop Breedlove's was the discovery of the two walkie-talkies in his trailer. However, the appellant shared this trailer with Flowers, and there is absolutely nothing, aside from Grant's testimony, to indicate that the appellant knew these items were stolen. In fact, it is undisputed that the appellant's grandmother had given at least three walkie-talkies of the same make to various members of his family, and the appellant testified that he believed these were the walkie-talkies in his trailer.

"Where in a felony case the only witness implicating the defendants in the crime is himself avowedly guilty, the corroborating circumstances necessary to dispense with another witness must be such as to connect the defendants with the offense and lead to an inference of guilt independent of the testimony of the accomplice." *Patterson* v. *State*, supra, at 582. Because there are no such corroborating circumstances in this case, I would reverse the appellant's conviction for knowingly receiving the property stolen from Pop Breedlove's. See generally OCGA § 16-8-7.

2. I find no evidence at all to support the appellant's conviction for receiving property stolen from hayes Truck & Tractor. Insofar as this offense was concerned, the sum total of the state's case was merely that property stolen from the store was discovered in a shed adjacent to the trailer which the appellant shared with Flowers, the actual perpetrator of the burglary. There was evidence that Flowers had free access to this shed. "Merely finding contraband on premises occupied by defendant is not sufficient to support a conviction if it affirmatively appears from the evidence that persons other than the defendant had equal opportunity to commit the crime." *Gee* v. *State*, 121 Ga. App. 41, 42 (172 SE2d 480) (1970); *Blankenship* v. *State*, 135 Ga. App. 482, 483 (218) SE2d 157) (1975). I would accordingly reverse the appellant's conviction of this offense, also.

APPENDIX D

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, March 30, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

64723 James K. Selvidge v. State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Note:

New page 6 in majority opinion; Judge Carley's concurring in part and dissenting in part also added. (copies enclosed) Please substitute and add to your opinion dated 3/14/83.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta MAR 30 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

ALTON HAWK
Clerk.

64723. SELVIDGE v. THE STATE. BA-174 to BI

CARLEY, Judge, concurring in part and dissenting in part.

With regard to the indictment relating to the burglary of Pop Breedlove's store, I agree with the majority that Grant's testi-

mony was sufficient to support appellant's conviction of that burglary. However, I join the dissent in concluding that the evidence was insufficient to sustain the conviction for theft by receiving with respect to the property stolen from Hayes Truck and Tractor.

conviction either on a motion for new trial or in this court. *Hart* v. *State*, 227 Ga. 171 (179 SE2d 346); *Moore* v. *State*, 138 Ga. App. 902 (2) (227 SE2d 809).

3. The remaining enumerations of error have all carefully been examined.

(a) There is sufficient circumstantial evidence, as supported by other direct evidence, to warrant a jury finding of guilt beyond a reasonable doubt.

(b) We are satisfied beyond a reasonable doubt that the victim Hayes sufficiently identified the tools recovered from Selvidge's out building as being his and the ones taken from his store.

(c) There was no error in allowing impeaching testimony from a statement made by the witness Flowers made to a police officer which was inconsistent with what he reputably said to his grandmother in her in-court testimony, especially in the absence of an objection or motion to strike.

(d) We find no merit, either, in any of the other numerus asserted errors raised by the appellant.

Judgment affirmed. Quillian, P. J. McMurray, P. J., Sognier, and Pope, JJ., concur. Shulman, C. J., and Deen, P. J., concur in judgment only. Carley, J., concurs in part and dissents in part. Banke, J., dissents.

APPENDIX E

IN THE SUPERIOR COURT FOR NEWTON COUNTY
STATE OF GEORGIA

INDICTMENT #6480
THEFT BY RECEIVING STOLEN PROPERTY
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

STATE OF GEORGIA

v.

JAMES KENNETH SELVIDGE

ORDER

This motion having been duly heard and considered, the same is hereby denied.

This 25th day of March, 1982.

GREELEY ELLIS
Judge, Superior Courts
Alcovy Judicial Circuit

FILED IN OFFICE
This 25th day of March 1982
MILDRED B. LORD, CLERK
Newton Superior Court

APPENDIX F

IN THE SUPERIOR COURT FOR NEWTON COUNTY
STATE OF GEORGIA

INDICTMENTS #6480 and #6482
THEFT BY RECEIVING STOLEN PROPERTY
MOTION FOR NEW TRIAL

STATE OF GEORGIA

v.

JAMES KENNETH SELVIDGE

ORDER

This motion having been duly heard and considered, the same is hereby denied.

With respect to the jury instructions, the record should show that instructions on "recent possession" were requested by defense counsel, and that the instructions actually given were prepared by defense counsel, the District Attorney and the Court, and were expressly approved by defense counsel before given to the jury.

SO ORDERED, this 25th day of March, 1982.

GREELEY ELLIS
Judge, Superior Courts
Alcovy Judicial Circuit

FILED IN OFFICE
This 25th day of March 1982
MILDRED B. LORD, CLERK
Newton Superior Court

APPENDIX G

FELONY OR STATE MISDEMEANOR SENTENCE
PARTIAL PROBATION

IN THE SUPERIOR COURT FOR NEWTON COUNTY, GEORGIA

Case No. 6480

Charge Theft by Receiving Stolen Property, Fel.
Count #1

October Term, 1981
(VERDICT) OF GUILTY

Attorney: Charles Strickland

THE STATE OF GEORGIA

vs.

JAMES KENNETH SELVIDGE

WHEREUPON it is ordered and adjudged by the Court that the Defendant James Kenneth Selvidge be taken from the Bar of the Court to the jail of this County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said defendant, shall be confined at labor for a term of ten (10) years to be computed according to law.

It is further ordered by the Court that the first eight years (8) of said sentence be served in confinement, but that the defendant be permitted to serve the balance of said sentence on probation—with said probation to begin immediately upon defendant's release from confinement—upon the following conditions: that defendant—

1. Avoid injurious and vicious habits.

2. Avoid persons or places of disreputable or harmful character.

3. Report to the probation officer as directed

4. Permit such officer to visit him at his home or elsewhere.

5. Work faithfully at suitable employment insofar as may be possible.

6. Remain within a specified location.

7. Support his legal dependents to the best of his ability.

8. Violate no local, State or Federal laws and be of general good behavior.

9. If permitted to move or travel to another State, agree to waive extradition from any jurisdiction where he may be found and not contest any effort by any jurisdiction to return him to the State of Georgia.

10. Pays through the Circuit Probation Office restitution in the amount of ____ and a fine in the amount of ____, in the following manner:

FILED IN OFFICE
This 6th day of Nov., 1981
MILDRED B. LORD, CLERK
Newton Superior Court

This 3rd day of Nov. 1981.

_____

Judge, Superior Courts
Alcovy Circuit

John T. Strauss, District Attorney
Alcovy Circuit

* * * * *

I, the undersigned (Clerk) (Deputy Clerk) of the Superior Court in and for said County, do hereby certify that the above is a true and complete copy of the sentence and judgment of the

Court in the case of State vs. James Kenneth Selvidge as appears of record and from the minutes of said Court.

Given under my official signature and the seal of said Court, this 17th day of Nov., 1981.

LINDA D. HAYS
(Deputy Clerk)

Recorded Crim Min Book 8
11-13-81 Page 300
MILDRED B. LORD,
CLERK Superior Court
Newton County, GA.

APPENDIX H

FELONY OR STATE MISDEMEANOR SENTENCE
PROBATION

IN THE SUPERIOR COURT
NEWTON COUNTY, GEORGIA

Case No. 6482

Charge Theft by Receiving Stolen Property
Felony

October Term, 1981
(VERDICT) OF GUILTY

Attorney: Charles Strickland

THE STATE OF GEORGIA

VS.

JAMES KENNETH SELVIDGE

WHEREUPON it is ordered and adjudged by the Court that the Defendant James Kenneth Selvidge be taken from the Bar of the Court to the jail of this County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said defendant, shall be confined at labor for a term of ten (10) years to be computed according to law.

HOWEVER, it is further ordered by the Court that the above sentence may be served on probation, under the supervision of the Officer designated by the Circuit Probation Office, PROVIDED, that said defendant complies with the following

special conditions herein imposed by the Court as a part of this sentence that defendant:

1. Avoid injurious and vicious habits.

2. Avoid persons or places of disreputable or harmful character.

3. Report to the probation officer as directed

4. Permit such officer to visit him at his home or elsewhere.

5. Work faithfully at suitable employment insofar as may be possible.

6. Remain within a specified location.

7. Support his legal dependents to the best of his ability.

8. Violate no local, State or Federal laws and be of general good behavior.

9. If permitted to move or travel to another State, agree to waive extradition from any jurisdiction where he may be found and not contest any effort by any jurisdiction to return him to the State of Georgia.

10. Pays through the Circuit Probation Office restitution in the amount of ____ and a fine in the amount of $1,000.00, in the following manner:

Fine to be paid at the rate of $10.00 per week, beginning thirty days after defendant is released from confinement.

Said sentence to run consecutively with previously imposed sentence of this date, Indictment Number 6480, Theft by Receiving Stolen Property, Felony.

The defendant was advised of his right to a review of the Sentence by the Sentence Review Panel.

FILED IN OFFICE
This 6th day of Nov., 1981
MILDRED B. LORD, CLERK
Newton Superior Court

This 3rd day of November 1981.

Judge, Superior Courts
Alcovy Circuit

John T. Strauss
District Attorney A.C.

* * * * *

I, the undersigned (Clerk) (Deputy Clerk) of the Superior Court in and for said County, do hereby certify that the above is a true and complete copy of the sentence and judgment of the Court in the case of State vs. James Kenneth Selvidge as appears of record and from the minutes of said Court.

Given under my official signature and the seal of said Court, this 13th day of November 1981.

LINDA D. HAYS
(Deputy Clerk)

Recorded Crim Min Book 8
11-13-81 Page 270
MILDRED B. LORD,
CLERK Superior Court
Newton County, GA.

APPENDIX I

GEORGIA, NEWTON COUNTY
IN THE SUPERIOR COURT OF SAID COUNTY

Case No. 6481

The Grand Jurors selected, chosen and sworn for the County of Newton to-wit:

I, Sam Ramsey, Foreman; (2) Hollis Blackshear; (3) Helen Knight; (4) Arthur Mae Jefferson; (5) John Wayne Cody; (6) Carole C. Doster; (7) Jean Burton; (8) Gail Bayes; (9) Johnny Blackshear, Jr.; (10) Judy Allen; (11) Henry Hollingsworth; (12) Weston M. Brown; (13) Marshall R. Elizer; (14) Joe W. Allgood; (15) Frank Castellana; (16) T. M. Ewing; (17) R. A. Maddox; (18) Isaac Henderson; (19) Harold J. Ayers; (20) Robert Lee Hurst, Sr.; (21) Connie W. Knight; (22) Jannie Bell Hammonds; (23) Georgia Anderson.

In the name and behalf of the citizens of Georgia, charge and accuse James Kenneth Selvidge with the offense of Theft by Receiving Stolen Property, Felony for that the said James Kenneth Selvidge on the 13th day of June, in the year Nineteen Hundred and eighty 80 in the County aforesaid, did then and there, unlawfully did receive stolen property, to-wit: beer, meat items, cigarettes, cigars, can goods and other various perishable foods, the property of Margaret Malcom, doing business as Malcom's Grocery, Highway 11 North, Newton County, Georgia, with a value of more than $200.00, knowing said property was stolen, said property not having been received with intent to restore it to the owner.

FILED OPEN COURT
This 8th day of Oct., 1981
MILDRED B. LORD, CLERK
Newton Superior Court
Alcovy Circuit

Contrary to the laws of said State, the good order, peace and dignity thereof.

Newton Superior Court

October Term, 1981

W. A. Reed
Prosecutor.

John T. Strauss
District Attorney
SPECIAL PRESENTMENT

We, the Jury, find the Defendant (Not Guilty)

This 23rd day of October, 1981

VICKI ALLEN, Foreperson

Recorded Crim Min Book 8
11-13-81 page 271
MILDRED B. LORD
Clerk Superior Court
Newton County, GA.

Georgia, Newton County

This is to certify that the within is a true and correct copy of Jury Verdict James Kenneth Selvidge Recorded Crim Min 8, Pg. 271.

INDICTMENT

No. 6481

SUPERIOR COURT
NEWTON COUNTY,

October Term, 1981

THE STATE

VS.

JAMES KENNETH SELVIDGE

Theft by Receiving Stolen Property,
Felony

True Bill
SAM RAMSEY, Foreman.
W. A. REED, Prosecutor.
JOHN STRAUSS District Attorney.

SPECIAL PRESENTMENT

WITNESS FOR THE STATE

The Defendant James Kenneth Selvidge waives formal arraignment, and pleads (Not Guilty) subject to ____ moving. This 19th day of Oct. 1981.

JAMES K. SELVIDGE, Defendant
CHARLES D. STRICKLAND, Defendant's Attorney
JOHN T. STRAUSS, District Attorney

APPENDIX J

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX K

O.C.G.A. § 16-8-7, formerly Ga. Code, 1933 § 26-1806, provides:

> "(a) A person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner. "Receiving" means acquiring possession or control or lending on the security of the property.
>
> (b) In any prosecution under this Code section it shall not be necessary to show a conviction of the principal thief."

APPENDIX L

942.02 Summoning witness in this state to testify in another state

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for

said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

APPENDIX M

. . . the dates here as to exactly when these things occurred. Of course, that's been waived. All we need to be concerned about is that it did occur within four years prior to the return of this indictment, the statute of limitations. Those were returned October the eighteenth, 1981. All these occurred four years prior to that indictment.

The testimony will show that starting with Ms. Malcolm's place that an entry was made and a substantial amount of beer, food, and other items were taken. The testimony will show that two people actually took these items, two men by the name of Jay Flowers, brother of the defendant, and a young man by the name of Harold David Grant, he is here to testify, both of these men are in prison. Flowers is some place in Florida, inaccessible to us; this man, Grant, is here. He is a thief. He is doing time. We make no bones about it. Grant, as the evidence will show, for one of those offenses, he was only involved directly in two of them, and the other

Q State your name, please.

A Harold David Grant.

Q Mr. Grant, do you know the defendant, Selvidge?

A Yes, sir.

Q How long have you known him?

A About a year.

Q All right. Did you know his brother, Jay Flowers?

A Yes, sir.

Q How long did you know him?

A About the same length, a year.

Q Prior to—well, let's say from about the middle of last summer through the end of the year, where was Jay Flowers living?

A He was here in Georgia, I believe.

Q Was he living with Mr. Selvidge?

A At times.

Q And did you occasionally get together with Jay Flowers and Selvidge at time?

A Yes, sir.

Q Did they get together at your house?

A No, sir.

Q Where would get together with them?

A Sometimes up in the parking lot in Covington.

Q And this would have been approximately a month and a half after this last break in at Pop's place?

A It seems like a little longer, but it might have been.

Q Whatever. You were questioned about Hayes Truck and Tractor burglary?

A Yes, sir.

Q Did you have anything to do with that?

A No, sir.

Q Who picked you up?

A Officer Reed.

Q Investigator Reed right there?

A Yes, sir.

Q To your knowledge, at that time had anybody else been arrested?

A No, sir.

Q And did Officer Reed tell you what you were charged with?

A At the beginning he just kept on asking me, you know, about a hole in the wall and he asked me, you know, that he knew what I did, I didn't know what he was talking about for a while.

Q But then did you realize what he was talking about?

By MR. STRICKLAND:

Q If you will speak into the microphone where the Judge and jury can hear you. What is your name, please ma'am?

A Freeda Pollard.

Q Also, Ms. J. C. Pollard?

A Ms. J. C. Pollard.

Q Where do you live, Ms. Pollard?

A Second Avenue in Mansfield, Georgia.

Q Do you known James Selvidge?

A He is my grandson. He is a son to me.

Q And how long has he been living at Mansfield, Georgia?

A Two or three years, about three years last time, I guess.

Q Does he live in a mobile home?

A Yes.

Q Are you a frequent visitor?

A Oh, yes.

Q How often do you go down there to his home.

A Quite often. I take him something, groceries or cooked food. He works all day and I take him something to eat.

Q Do you do that on a regular basis?

A Pretty regular, two or three times, three.

A Oh, they worked pretty good for a while.

Q Were any of them ever broken, to your knowledge?

A Not that I know of.

Q Not that you know of.

MR. STRAUSS: I believe that's all.

THE COURT: Mr. Strickland?

RE-DIRECT EXAMINATION

By MR. STRICKLAND:

Q. Ms. Pollard, did you clean up the trailer?

A Yes.

Q Mr. Selvidge was not married at the time, was he?

A No.

Q Was he living there by himself?

A Yes.

Q Did you go in and clean his trailer?

A I did.

Q And how often did you do that?

A Not to often, maybe every two weeks, every week.

Q And did you clean throughout his trailer, did you clean throughout his trailer?

A Oh, yes, I sure did.

Q Did you see any beer in his trailer?

A I never even saw a beer can.

Q Does he drink beer?

A I never saw him drinking any beer.

Q Did you ever see any box of meat?

A No.

Q Did you ever see any wine?

A No.

Q Did you ever see any excessive amount of groceries?

A Not excessive, no.

Q And what he had, did you take there most of the time?

A I sure did.

Q You did the shopping for he and your house?

A Yes.

Q Do you know where your other grandson is, Jay Mitchell Flowers?

A I do.

Q Where is he?

A In a drug treatment center in Florida.

Q And has he had a history of drug problems?

A Yes, he does.

Q Was he the same one that lived with James?

A He lived there with him a while.

Q With James?

A Yes.

Q Do you know of any problems that he and James had or might have had?

A He would take his car every chance he got or his truck and drive it and have somebody chasing him or he would drink and he was taking drugs and he was irratic, you couldn't trust him.

Q Do you know this David Grant?

A Yes, he came to my house and I fed him.

Q You fed him?

A Yes.

Q Did you ever observe him drinking or taking drugs?

A He was taking drugs, he admitted to me he took drugs.

Q When was this?

A While he was working at Beaver Manufacturing Company. I was lecturing him.

Q Why is your son down at this drug treatment center?

A He said he was taking everything he could get his hands on.

Q Did the Court send him down there?

A Yes.

Q He was involved in a robbery?

A He admitted it, he said he was the only one that was in it.

MR STRICKLAND: That's all.

RE-CROSS EXAMINATION

By MR. STRAUSS:

Q Let me see if I understand you correctly. You say that Jay Flowers told you that he was the only one that was involved?

A He told me that his brother was not involved, it was only him.

Q That's what he told you?

A That's what he told me.

(Whereupon, State's exhibit number seventeen is marked for identification.)

By MR. STRAUSS:

Q Ms. Pollard, I know he was under arrest, Jay Mitchell Flowers, that is by Investigator Reed with the Sheriff's Department?

A Yes, sir.

Q You knew he gave a statement to the police?

A I suppose he did.

Q Does his statement to you, according to your direct testimony, was that he did it by himself; is that correct?

A Many times more than once he told me that. He called his brother Barney, said, "Barney had nothing to do with it."

Q Did he mention David Grant?

A I don't remember if he mentioned David.

Q I ask you whether or not he said, "Me and David Grant broke into it, we knocked the air conditioner out and took a lot of beer, fifteen dollars worth of beer and grabbed anything we could grab real quick." Did he ever say that David Grant was involved?

A I knew he ran around with David, but I don't remember him saying that.

Q All right. Did he ever tell you about his involvement in a burglary at that time, Hayes Truck and Tractor?

A He told me that he did it.

Q He said he did it. All right. Did he ever tell you quote how did you get the tools away? I took them to grandmother's house and I called my brother, he came down there, he knows they are stolen. He had to know where they came from. Investigator Reed asked him where they came from and he come and picked me up. I should have got more than I did, I know I left the bolt cutters, I know I left the door open, I was going to go back and try to wipe the prints off, but I didn't. I got the tools, I got two cardboard boxes and carried everything in two boxes, I carried one box at a time out of the building and my grandmother's house was only about fifty yards from the building and I hid them in the bushes and I got a hold to my brother and he came down there and picked me up and took me to his house. Where are they now? At his house, as far as I know. Did he tell you about the tools he stole?

A He told Judge Stephenson he sold them to get drugs, that's all he told me about them.

Q That might account for part of it, did he tell you he left part of the tools at James Selvidge's house?

A No, he didn't.

Q Ma'am, I think rather than my going through this, can you see all right, do you want to see if there is anything there that he did tell you?

THE COURT: While the witness is doing that, we are going to take a brief recess.

(Whereupon, the jury retires from the courtroom and a brief recess is held.)

CONTINUING RE-CROSS EXAMINATION

By MR. STRAUSS:

Q Ms. Pollard, during the recess, you have had an opportunity, I believe, to go over this statement and the waiver attached to it. Now, did he tell you everything that is stated in here?

A No, he didn't.

Q He didn't tell you all these things?

A No, but when my grandson, Keith, made him move out of the trailer he said he would get even with him and I think he has.

Q In any case, he talked to you and he said Selvidge was not involved?

A He certainly did. He had a truck to drive.

Q But—

A He was working for a man and I don't believe they ever caught him, he drove that truck or else, he stole his truck, he might even have taken ours, my husband had a truck—

MR. STRAUSS: Your Honor, I move into evidence State's exhibit number seventeen, the witness has now had a chance to inspect.

MR. STRICKLAND: I object to its admission. It is the fashion of a third party. I don't believe it would be admissible in any proceeding except his own trial.

MR. STRAUSS: Ordinarily, I would agree. However, on direct examination the Court well remembers Mr. Strickland's witness, while under direct indicated that he gave a statement to her exonerating the defendant. What this statement is introduced for, is strictly to rebutt that statement and show prior inconsistencies.

THE COURT: That statement, I presume, shows what Mr. Flowers told someone else?

MR. STRAUSS: Told investigator Reed.

THE COURT: It doesn't purport to show what he told her?

MR. STRAUSS: This is t show that in fact, it is what he told Investigator Reed was entirely inconsistent with what he told Ms. Pollard.

THE COURT: Objection sustained. It is not admitted.

MR. STRAUSS: I would like to ask the Court, if I may, to, for my own edification the basis of the ruling?

THE COURT: I explained it, Mr. Strauss. The direct question was what Mr. Flowers might have told this witness, not what he told Mr. Reed.

MR. STRAUSS: Your Honor, but—

THE COURT: What he told Mr. Reed doesn't rebutt what he told her. He might have told two stories.

MR. STRAUSS: I think it is important for the jury to know he told two stories.

THE COURT: That's not an issue in this case. This is clearly hearsay evidence.

MR. STRAUSS: All right, your Honor.

THE COURT: It doesn't rebutt what he might have told her, it simply another statement. It is not admissible, It is out.

MR. STRAUSS: I understand the Court's ruling.

THE COURT: Go on to something else.

By MR. STRAUSS:

Q Ms. Pollard, one last area of questioning I would like to go into, that is, very simply when did you start first cleaning house for your grandson, Selvidge?

A When his wife left.

Q Were you cleaning the house at the time that Jay Mitchell was staying over there, too?

A Cleaned it more, then.

Q I am sure you did. Did you find beer over there at that time?

A I found it there and when he left my house he left a closet full of empty beer bottles and cans and he left a six pack tied to a line outside his

At this time we are going to recess until tomorrow morning at nine thirty.

(Whereupon, the jury is excused.)

MR. STRICKLAND: I have a motion outside the presence of the jury. If it please the Court, I make a motion for a directed verdict of acquittal. Excuse me, I possible should have made this at the close of the State's witness, but I reserved it until I put up some evidence and the reason for this is that there is no evidence that I can see to go to the jury to sustain a conviction against Mr. Selvidge, and the only testimony really was that of Mr. David Grant, and even if it would be believed by the jury, it would be the testimony of an accomplice, and, of course, if that's the only evidence that is presented, then the trial court should grant a motion for directed verdict of acquittal and

based on the evidence and what the witness has said, there is really no evidence at all connecting him with this crime, unless the testimony of David Grant is believed, and if it is believed, then, as I stated earlier, he is an accomplice, and for those reasons I respectfully request the Court to grant a motion for a directed verdict of acquittal or to direct a verdict of acquittal.

THE COURT: Mr. Strauss?

MR. STRAUSS: Your Honor, I will cite to the Court Powell versus the State, 123 Georgia Appeals, 795, held in any case where the only witness is an accomplice, it's corroborating circumstances sustains the testimony of the accomplice and of the alleged crime.

In this case, the testimony of David Grant, who testified specifically implicating the defendant in the circumstances of bringing the goods into his home, we have had ample evidence and testimony with respect to the nature of certain goods found on his premises. We have got all the circumstances as far as time and place fitting together with the exception of the defendant's testimony about the access to the car. All things jive, there is present corroborating evidence, there is no question, it is enough to go to the jury.

THE COURT: Let's take the three different indictments separately. Let's refer first to indictment 6481, concerning the burglary of Malcolm's Grocery and the items that were taken from the burglary. What evidence, Mr. Strauss, connects this defendant with the items taken except that of Mr. Grant?

MR. STRAUSS: Your Honor, the situation here we are looking at a common scheme, motive. You cannot separate one from another. We are talking about a continuance stream and pattern of events. Now, the evidence that establishes, that is, the fact that we found other goods received from other burglaries at which David Grant tesified as to one, therefore, the other applies in as well as we have corroboration of his involvement in the truthfulness of what he said, not only corroborates by the description of exactly how the goods were taken by the accomplice, but also the testimony of his wife. All of the three

together is a continuance pattern, involvement to show that one corroborating to the other, so you have to look at the things as a common scheme and plan, that's precisely what we have seen, that Selvidge was the receiver for these other thieves. It is that simple, one corroborated the other.

THE COURT: Well, you have shown that you have present evidence that the defendant was actually involved in the burglary of the Breedlove's business.

MR. STRAUSS: No question.

THE COURT: Are you suggesting that involvement in that crime, if the jury believes the evidence presented, would corroborate the testimony of the accomplice in the Malcolm burglary?

MR. STRAUSS: That's precisely what I am stating to the Court.

THE COURT: What is your response to that, Mr. Strickland?

MR. STRICKLAND: No, sir, I don't think it would, your Honor. Those are three distinct incidents and if Mr. Grant's testimony, I believe he stated that these were separate incidents, that they didn't even plan it, they thought about it spontaneously, and they did it, and these are three separate incidents, they can't be connected; so I do[illegible] see how one could corroborate the other.

MR. STRAUSS: The whole basis, if I may state this, that the need for corroboration is simply because of the concern of the courts, legitimately, that one accomplice may have such an interest in the outcome of the litigation that he couldn't be testifying by himself to convict another, that's why you have to have two accomplices or you have other evidence to show that this particular accomplice, who was taking the stand as a witness, is being truthful, but he is not coming up with something off the wall. Now, here we have a whole pattern, motive and scheme. Three distinct offenses, two of which he can speak to, one of which he can speak to the evidence recovered which is already proceeds of that crime and a second incident, we have

goods received completely independent of his testimony which tends to corroborate and make valid the fact that Mr. Selvidge is in fact the received. The fact that he, that is, Grant and Flowers, were involved in both of the first two incidents and the fact we found goods that came from allegedly one of those burglaries in his home, and the act that the statements by Ms. Grant corroborates specifically the second of those, she not being an accomplice, shows that he is credible to the whole thing.

THE COURT: Let me point out further that, with respect to Mr. Strickland's motion, the only indictment I am concerned about is the one I mentioned, Malcolm's, because there were items burglarized from the other two establishments found in the possession of the defendant. That, alone, will be sufficient to corroborate, but with respect to the Malcolm's burglary, none of those items were found in his possession.

MR. STRAUSS: Because they were consumed and I grant you that.

THE COURT: The fact is none were found in his possession. It seems to me the question presented is whether or not evidence of other crimes such as has been presented here would be sufficient to corroborate the testimony of an accomplice with respect to items taken from the Malcolm burglary. I don't know of any authority on that point, but I will give you gentlemen a chance to research that. We need to find some case law on that point. The only evidence presented to corroborate the testimony of the accomplice with respect to the items taken from Malcolm's burglary is the fact there were two other similar offenses and whether that's sufficient or not is a question I don't have the answer to. I would like some authority on that question. I deny the motion with respect to the other two indictments, and I reserve my decision with respect to this indictment until I have seen more authority.

Let's take up the request of charge so you men will know what to expect tomorrow in your argument. The State has no request of charge. The Defendant has filed two requests of

charge. Number one concerns with accident or misfortune. Mr. Strickland, I presume your request goes to the fact that Jay Flowers had access to the premises of the defendant and therefore conceivably could have placed items there without the knowledge of the defendant?

MR. STRICKLAND: That's true, your Honor.

THE COURT: But I don't think that would be accident or misfortune. I think that defense is a part for general denial. You may argue that point if you wish in arguing your case and the jury will be amply instructed on the burden of proof, the presumption of innocence and reasonable doubt, but I find this request of charge to be inproper in the circumstances of the case and will not be given for that reason.

Turning now to the request of charge number two, I will not give this request as requested, but you touch on a principle of law there which I think the jury should be instructed on and that is the fact that mere possession alone, standing alone of stolen items does not permit the jury to infer that he received those stolen items with knowledge they were stolen. Now, in this case, there is no evidence, so technically speaking, we aren't dealing with a situation where there is merely possession standing alone. We are dealing with the situation where possession of stolen items definitely is a part of the case and I am sure the State is relying heavily on that. I think the jury should be instructed that if they find that he was in fact in possession of stolen items, that they cannot infer from that alone that the defendant is guilty, but they may consider that factor along with other evidence if they find there is no evidence of his guilt in inferring that he did in fact receive these items with knowledge that they were stolen.

MR. STRAUSS: May I point out something here?

THE COURT: We have to instruct the jury you can't go on that alone, but you can consider that if you find other evidence that he received these items with knowledge that they were stolen, will counsel prepare an appropriate charge on that?

MR. STRAUSS: It does not get into the knowledge or reason to know it could be other evidence that would give him reason to believe that the items were stolen.

THE COURT: Well, the law is that the State must prove beyond a reasonable doubt that the defendant knew or should have known at the time he received these items that they were stolen property. First, they got to find that he was in possession but that he did receive stolen property and; secondly, that he knew or should have known at that time that it was stolen property.

MR. STRAUSS: Or retained it after he was aware that it was, I certainly will try and put something together.

THE COURT: It will be helpful to the Court to work an appropriate charge covering that. The law is not that lengthy, the code section is quite simply—it's just a matter of choosing the proper language for the State and the defense. Let me ask you this; is there any issue regarding the value of the property involved, the indictment all alleging that the values exceeded two hundred dollars.

MR. STRICKLAND: I think there is some question there, your Honor, because the only witness that could testify as to what was actually stolen was Mr. Grant; he couldn't testify to anything he didn't know what was stolen. He did refer to these papers, but when I asked him questions about them he said he could read what was on the paper, but he had no knowledge of what they actually took and he would say something like ten cartons cigarettes well, they had forty-five and if you believed his testimony, it would be a question about the value and there is a possibility.

THE COURT: The defense having taken that position, the Court will have to respect that and will charge that one, that if they find him guilty, one is they find him guilty, but that the items in possession were less than two hundred dollars or two hundred dollars or less and, of course, a verdict of not guilty. Any questions about that?

MR. STRAUSS: I don't see the evidence as to any question in this case, but—

THE COURT: I think the evidence is shaky enough on that point that the defense is entitled to take that position.

MR. STRAUSS: I see no reason to take the risk.

THE COURT: I so rule. There will be three alternatives on each indictment, so if you do two things, get something presented on the question with respect to the first indictment dealing with the Malcolm burglary and work up an appropriate charge regarding the offense itself.

(Whereupon, Court is adjourned and an overnight recess was held.)

10-23-81:

THE COURT: As you recall from the beginning of the trial, the defendant is on trial for charges set forth in three indictments; indictment number 6480 concerning the property taken from Hayes Truck and Tractor; indictment number 6481, concerning the property taken from Malcolm's Grocery and indictment number 6482, concerning the property taken from the Pony Express Stop and Go, that's the business of Mr. Breedlove. For technical reasons, which you are not to concern yourselves with, I am removing from your consideration the indictment number 6481 which has to do with the property from Malcolm's Grocery. You will consider only the charges alleged in 6480 and 6482 having to do with the property taken from Hayes Truck and Tractor and Mr. Breedlove's business. You may proceed with closing arguments.

MR. STRAUSS: The State waives opening, your

in possession of Selvidge? Has anybody said, "Well, Jay Flowers left them we me or the other grandson left his with me?" No. You see, certainly Mr. Pollard hasn't given him his, he would have said so if he did. So two of them together—now, the interesting thing is well, I can tell from these marks that these are the ones or I remember this to be mine, but what does Ms.

Breedlove say? She said, "Look, well I know these have got to be the same ones, not because they are Realistic, not because of the same type, but there is a curvature, a bend in both antennas, this is broke off and see the chips off the back of this one here." They pointed to three things on these two that said these are mine. Okay, nobody else has done that. And you bet the defense would have brought in all the other evidence with respect to these other walkie-talkies to prove that those two were the same, that is, if they had that evidence available. There is no question about it.

Now, Ms. Pollard's testimony about really not being sure when she was cleaning and how long it was that Jay told her about committing these crimes and if he told her James Selvidge was involved. I don't fault her. That's a grandparent. I have to apologize to her for that, I don't know when she got up there and said Jay Flowers said that Selvidge was not involved, we had to bring to your attention that that wasn't true the best I could without bringing it out and she hadn't told him or her hadn't told her—excuse me, about the involvement in Hayes, he hadn't tole her about what Selvidge's involvement was, that was apparent. She read through the statement in the recess, he hasn't told her any of that stuff that you have already heard from testimony showed that was confessed to Dale Reed. The man is doing prison time, folks don't confess to go to prison if they are not basically telling the truth. So she didn't know about that. All right. I am sure it must be very, very hard for her having one grandson already in prison to think that the better might have encouraged the one that was in prison, that's unless it is impossible. Now, I think with one exception, you can do that, with the exception, I believe is the defendant, so we will talk about it.

Let me start at the defense end of the testimony first. Now, there is no question in my mind that Mr. Pollard told what he knew to be the truth. I don't doubt for one minute and I don't think you do either that this one set of tools here, this one here, this set of tools which is marked state's exhibit twelve, is his, he so identified it, that is possible. Mr. Hayes said he sold this

type of tools. All right. Also there is no reason to doubt that and as far as for your consideration because it is part of the evidence, but I am not concerned about that, this box of tools you will look at the list that Mr. Hayes prepared, this is only one of multiple items here and the items he described here, all the evidence that was in here, he totaled it up and it was four hundred and eighty-one dollars worth, if you take that item out, and the only other item out, according to my recollection, we are not talking about the box, because that's not the issue, and the bolt cutters, these two are not going to reduce that four hundred and eighty dollars below two hundred dollars, so I don't think there is any problem as far as value if those are his, they very well may be. It is no problem. Selvidge works with him, working with the tools, he could have brought some of the tools home to the storage shed, but, of course, what that does is prove nothing else, so I won't talk about it. Some of the old stuff may have belonged to Mr. Pollard. He got the box from a gentlemen he signed a note with, there is no question about that. The question is, what was received by Selvidge here totaled over two hundred dollars in value and the testimony indicates very clearly that it was stolen.

All right. With respect to the other items, the one from Breedlove's, you got a very, very clear indication, state's exhibit five an six, testified to by Ms. Breedlove the fact of the case, I certainly understand that. All right, so that's not inconsistent, neither of the Pollard's testimony is inconsistent with what we know.

All right. Now, let's talk about Selvidge himself. He doesn't know anything about it. The storage shed is out there any anybody can come and go and all the stuff ended up there, right? But you saw my first question, the first question I asked him on cross examination was about the parking meter, he obviously knew that was in there, right? Ripped out of the concrete, that's obviously stolen, he knows it is stolen, but he didn't say anything about it, he said, "You know my little brother". We are not accusing James Selvidge of stealing it, we are accusing him of aiding or abetting or being a receiver of

stolen goods. That's what he is charged with doing. By his own admission, with respect to the parking meter, he has to be a receiver of stolen goods. If he does it in one case what is he going to do in the other cases? He claims he has never seen these tool boxes before. Now, I ask you, particularly you men, you may not know everything, but you know whether or not you have tools if you got a storage shed or work room or closet. You stick your tools in the closet, you go in there and see a new box of tools there, he has to go in and out, he works as a plumber by everybody's testimony, he works as a plumber and at a mobile home he has got to have a place to store the tools. You are going to tell me he doesn't know there is a box of tools lying around he never saw, he never looked in the draw and never saw these things, never looked in there and seen all these crescent wrenches, these are good wrenches, screw drivers, didn't use them, didn't know they were there? Come on, that's about as credible as—

All right. Now, what about the Bible that's all wrapped up, what about this water jug that's all wrapped up. He didn't know anything about that. There is no explanation about all those things. Now, the key thing here is did he ever try to find the owners of any of that property? The property that he admitted he knew was there, did he try to find the owner of the property and return it to the owner? No. He continued to keep that, he received it without intent of restoring it to the owner. Did he ever get in touch with Mr. Hayes and say, "This might be some of your stuff"? Grandmother lived fifty yards away from Mr. hayes. No, of course not.

Now, the other thing you got to realize too, is by his own admission, the only one in this crowd during the period we are talking about, Malcolm's Grocery aside, that's no longer in consideration, the only one who had any transportation in this whole crowd, Flowers, Grant or Selvidge was Selvidge. Only one. Now look at the list of stuff, you are going to be able to lift these things and carry them around. I am weak, but you can look at all this stuff and look at the

CHARGE OF THE COURT

Ladies and gentlemen of the jury, it now becomes my duty as presiding Judge to instruct you as to the principles of law applicable to this case, and to explain to you the procedure to be followed in reaching your verdict.

Now, the grand jury of this county has returned two indictments against this defendant, and charging him in each indictment with the offense of theft by receiving stolen property. You will have these with you in the jury room, and you should refer to them as often as you wish to see the specific charge against the defendant.

Now, you must make a finding of guilt or innocence with respect to each indictment. You should keep that in mind as the charge of the Court progresses.

Now, to these indictments, to each of them, the defendant has entered his plea of not guilty; and this creates the issue to be decided by you on each indictment, that is, his guilt or his innocence.

Now, I charge you that the indictment is not evidence of his guilt, and his plea of not guilty is not evidence of his innocence. This is simply the manner in which the issue is presented to you for your decision.

It is your duty to determine the facts of the case, based upon the evidence presented to you, and to apply to these facts the principles of law given to you by the Court, and in that manner, reach a verdict which speaks the truth. The object of this and all other legal investigations is the discovery of the truth. You are not responsible for the effect or consequences of your verdict; but you are responsible that it speak the truth.

The defendant enters upon this trial with the presumption of innocence in his favor, and this presumption remains with him throughout the trial, until and unless it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.

The burden, therefore, is upon the State to prove each essential element of the offense charged in each indictment beyond a reasonable doubt. And I charge you that each element of the offense charged is essential except that of the date. With respect to the date, it is sufficient to find that the alleged offense was committed anytime within four years of the date this indictment was returned in open court, and I charge you that each indictment was returned in open court on the eightth day of October of this year, that is, 1981.

Now, the State is not required to prove the guilt of the defendant beyond all doubt, or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt, ladies and gentlemen, is just what the term implies. It is a doubt based upon reason. It is not a fancy or a conjecture or a supposition that the defendant might be innocent, but is just such a doubt as a reasonable man or woman would have and would act upon, or decline to act upon, in a matter of importance or of grave concern to himself or herself. In other words, it is the doubt of a fair-minded, impartial juror honestly seeking the truth, and it may arise from a consideration of the evidence or from a lack of evidence.

You are the sole and exclusive judges of the facts in the case. You pass upon the weight, force and credit to be given to the evidence in the case and you alone determine the credibility of the witnesses who have testified in the case. In passing upon the credibility of the witnesses, you are authorized to consider all the facts and circumstances of the case, the witnesses manner on the stand, their means and opportunities for knowing the matters about which they testified, their interest or want of interest in the case, their intelligence or lack of intelligence, the nature of the matters to which they testified the probability or improbability of their testimony, their bias or prejudice, if any and also their personal credibility as the same may legitimately appear from the trial. You may also consider the witnesses relation to the case or the parties in the case. All of

these things are proper matters for your consideration, insofar as they legitimately appear from the trial of the case. It is for you, the jury, to finally determine what credit is to be given to the testimony of a witness who has testified in this case.

The defendant may not be compelled to testify, but when he elects to do so as he has in this case, the law provides that he shall be sworn, examined and cross examined as any other witness. You are instructed that you have no right to disregard his testimony merely because he is accused of crime; that his testimony is to be received and assessed by you, and his credibility tested by you, in the same manner as the testimony of other witnesses; and you are to weigh his testimony along with all the other evidence in the case, in deciding his guilt or innocence.

If there are conflicts in the testimony, it is your duty to reconcile those conflicts, if you can, so as not to impute perjury to any witness; but if there are conflicts which you cannot reconcile, then you should believe that wintess or those witnesses you find to be most believable.

I charge you now as to two types of evidence. Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which generally tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed.

To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but they must exclude every other reasonable hypothesis save that of the guilt of the accused.

I charge you, however, that whether dependent upon direct or circumstantial evidence, the true test in a criminal case in not whether the conclusion at which the evidence points may be false, but is whether or not the evidence is sufficiently strong to satisfy you of the defendant's guilt to a reasonable and moral certainty and beyond a reasonable doubt. If the evidence is thus strong, it would be your duty to convict. If it is not thus strong, it would be equally your duty to acquit.

Now, the state has presented the testimony of a witness claimedby the State to be an accomplice in the crime alleged in each of these indictments –in one of these indictments, the one dealing with the Breedlove place of business. In ths connection *I charge you that to be an accomplice in the alleged crime, the witness must have participated in the criminal acts alleged in the indictment with criminal intent, and be subject to prosecution for such conduct.* I charge you further in this connection that the testimony of a single witness is generally sufficient to establish a fact, but the testimony of an accompliance is an exception to the general rule and that a person accused of crime cannot be convicted on the testimony of an accomplice unless such testimony is supported by other evidence connecting the accused with the alleged crime and tending to show his participation therein; which other evidence would lead to an inference of the guilt of the accused independently of the testimony of the accomplice. Such supporting evidence may be direct or circumstantial evidence, and it need not be sufficient of itself to warrant a verdict of guilt, but it would be sufficient if it otherwise implicated the accused, as a party to the alleged crime, and out believe it to be true, and you believe the accused to be guilty beyond a reasonable doubt.

Whether or not the witness claimed to be an accomplice is, infact, an accomplice, whether there has been additional and confirming evidence presentedthat supports the testimony of the witness claimed to be an accomplice, and the weight to be given the testimony of any accomplice is supported by other evidence is all matters for you to determine under the rules I have just given you. The Court does not intimate that there is or that there is not any testimony of an accomplice in this case. The Court simply give you the rule and if there is any evidence that has been delivered in the case by an accomplice, then you will apply this rule that the Court has given you in charge as to that testimony.

I charge you that Code Section 26-801 of the State of Georgia as applied to this case, provides that *every person concerned in the commission of a crime is a party thereto and may be*

charged with and convicted of commission of the crime. I furter charge you that a person is concerned in the commission of a crime only if he directly commits the crime, or intentionally aides or abets in the commission of the crime, or intentionally advises, encourages, hires, counsel or procures another to commit the crime.

I charge you that, for the purposes of this case, a crime may be defined as a violation of a statute of this state in which there shall be a union or joint operation of act and intention.

An accused person will not e presumed to have acted with criminal intention; but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for whch the accused is prosecuted.

Now on each of these indictments the state contends that the defendant is guilty of the offense of theft by receiving stolen property; and in that connection I charge you that Code Section 26-1806A of the Code of Georgia, as applied to this case, provides that a person commits theft by receiving stolen property when he receives, disposes of or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner. Receiving, as here used, means acquiring, possession or control of the property in question.

I further charge you that an essential element to the crime of theft by receiving stolen property which you must find in order to convict is that the defendant knew or should have known that the goods were stolen when the defendat received the property, if you find that he did, in fact, receive stolen property.

I charge you further that mere proof of possession of recently stolen property standing alone will not authorize an inference that the possessor received it with knowledge that the property was stolen, *but if you find there is other evidence tending to show that the defendant received stolen property*

with knowledge that it was stolen, you may consider that evidence, together with the evidence of his possession of such property in deciding his guilt or innocence.

Now, you will note in each indictment that the accused is charged with receiving stolen property of value of two hundred dollars, that is, in excess of two hundred dollars. Now, I charge you that if you find beyond a reasonable doubt that the defendant did, at any time within four years next preceding the date this indictment was filed in this court, which was on the eighth day of October, 1981, commit the offense of theft by receiving stolen property as alleged in the indictment, then you would be authorized and it would be your duty to convict the defendant of this offense, and in that even the form of your verdict will be, "We, the jury, find the defendant guilty."

Now, if you find the defendan guilty as charged in each indictment except that you find the property received by him had a value of two hundred dollars or less, then the form of your verdict would be, "We, the jury, find the defendant guilty of theft by receiving stolen property having a value of two hundred dollars or less."

Now, if you do not find beyond a reasonable doubt that the defendant committed the offense of theft by receiving stolen property as alleged, in the indictment, you should gve him the benefit of that doubt and acquit him, and in that event the form of your verdict would be, "We, the jury, find the defendant not guilty."

Now, the defendant in this case contends with respect to indictment 6482, dealing with the property allegedly taken from the Breedlove's business, that at the time that alleged offense occurred, he was somewhere else, that he was visiting his girlfriend who was sick in the hospital. This is known as the defense of alibi. In that connection I charge you that the burden is upon the State to prove beyond a reasonable doubt as I have instructed you earlier, that the defendant was present at the time of the alleged offense and did, in fact, commit the offense as alleged in this indictment. Any evidence in the nature of alibi

should be considered by the jury in connection with all the evidence in this case and if in doing so, the jury should entertain a reasonable doubt as to the guilt of the defendant, they should acquit him.

Now, I remind you again that you are dealing with two indictments and you must find his gult or innocence as charged i each indictment.

To summarize briefly, there are three possible verdicts you may reach on each of these indictments. If you find he is guilty as charged, the form of your verdict would be, "We, the jury, find the defendant guilty." If you find him guilty as charged except you find that the property received by him had a value of two hundred dollars or less, the form of your verdict would be, "We, the jury, find the defendant guilty of theft by receiving stolen property having a value of two hundred dollars or less." If you find the defendant not guilty, the form of your verdict would be, "We, the juyr, find the defendant not guilty."

Now, on the back of each of these indictments is a form which you may use in entering your verdict. It presenting reads, "We, the jury, find the defendant not guilty—guilty." Thre is a space there to insert the date and also insert the signature of your foreperson. Now, you should take a pen or pencil and cross out the words and/or add the words necessary to make this verdict form express your findings with respect to the charge in each indictment. It should be dated and signed by one of your members as foreperson.

By no rulings which the Court has made during the progress of this trial has the Court intimated or expressed any opnion upon the facts of this case, upon the weight of the evidence, or upon the guilt or innocence of the defendant.

By no portion of this charge has the Court intimated or expressed any opinion upon any of these matters, each and all of which belong exclusively to you for your judgment and determination.

The Court states the law. You find the facts. You apply the one to the other and in that way reach a verdict which speaks the truth.

You are the sole judges of the facts of the case. You are the sole judges of the credibility of the witnesses. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the accused and that is the only issue you are to deliberate in this case; that is, his guilt or innocence with respect to each of these indictments.

Now, whatever your verdict is, it must be agreed to by all twelve of you and entered in accordance with the previous directons of the Court. I will ask you at this time to please retire to the jury room for just a few minutes. I will bring you out again and give you further instructions.

(Whereupon, the jury retires to

IN THE SUPERIOR COURT OF NEWTON COUNTY
STATE OF GEORGIA

Theft by Receiving—Felony

THE STATE OF GEORGIA

vs.

JAMES SELVIDGE

The above-entitled matter came on for hearing before Honorable Greeley Ellis, and a jury commencing on October 22, 1981.

APPEARANCES OF COUNSEL

For the State: John Strauss, D.A.

For the Defendant: Charles Strickland, Esq.

INDEX

* * *

APPENDIX N

IN THE SUPERIOR COURT OF NEWTON COUNTY
STATE OF GEORGIA

INDICTMENTS 6480 & 6482

STATE OF GEORGIA,

Plaintiff,

vs.

JAMES KENNETH SELVIDGE,

Defendant.

FILED IN OFFICE
This 17th day of November 1981
Mildred B. Lord, CLERK
Newton Superior Court

MOTION FOR NEW TRIAL AND BOND

COMES NOW, JAMES KENNETH SELVIDGE, Defendant, who shows the Court that he was indicted by the Grand Jury of Newton County on Indictment No. 6480, theft by receiving stolen property, felony, on October 8, 1981, and was indicated on indictment number 5482, theft by receiving stolen property, felony, on October 8, 1981, and was tried on each of these charges on October 22, and October 23, 1981 and found guilty on each of said counts. Defendant shows that sentence was imposed and judgment rendered on November 3, 1981.

The Defendant, JAMES KENNETH SELVIDGE, being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 30 days from said trial, and moves the Court for a new trial, upon the following grounds, to-wit:

1st because the verdict is contrary to evidence and without evidence to support it.

2nd because the verdict is decidedly and strongly against the weight of the evidence.

3rd because the verdict is contrary to law and the principals of justice and equity.

Whereupon JAMES KENNETH SELVIDGE prays that these, his general grounds for a new trial, be inquired of by the Court, and that a new trial be granted, and that Defendant remain on bond pending determination.

G. ALAN BLACKBURN
ATTORNEY FOR MOVANT

JUDGE GREFLEY ELLIS,
NEWTON COUNTY SUPERIOR COURT

IN THE SUPERIOR COURT OF NEWTON COUNTY
STATE OF GEORGIA

INDICTMENTS 6480 & 6482

STATE OF GEORGIA,

Plaintiff,

v.

JAMES KENNETH SELVIDGE,

Defendant.

FILED IN OFFICE
This 29th day of January 1982
Mildred B. Lard, CLERK
Newton Superior Court

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING VERDICT

COMES NOW, JAMES KENNETH SELVIDGE, Defendant who files this his Amended Motion and shows the Court as follows:

(a) Defendant was indicted by the Grand Jury of Newton County, Georgia on October 8, 1981 on Indictment #6480, theft by receiving stolen property, felony, said property being the property of Lee Hayes. Defendant was tried on October 22 and 23, 1981, on Indictments #6480, #6481 and #6482 jointly. Defendant was found guilty on Indictment #6480 on October 23, 1981, and was sentenced to ten (10) years, with the first eight (8) years to be served in confinement and the last two (2) years to be served on probation, said Judgment being filed with the Clerk of the Court on November 6, 1981;

(b) Defendant shows that he was indicted by the Grand Jury of Newton County, Georgia on October 8, 1981 on Indictment #6481, theft by receiving stolen property, felony, said

property being the property of Margaret Malcolm. On October 22 and 23, 1981, Defendant was tried on Indictments #6480, 6481 and #6482 jointly. A directed verdict of not guilty was rendered on October 23, 1981 and was recorded on November 13, 1981 in the Criminal Minute Boopk 8 at page 271, by the Clerk of the Superior Court of Newton County, Georgia;

(c) Defendant shows that he was indicted by the Grand Jury of Newton County, Georgia on October 8, 1981 on Indictment #6482, theft by receiving stolen property, felony, said property being the property of Pop Breedlove. Defendant was tried on October 22 and 23, 1981, on Indictments #6480, #6481 and #6482 jointly. Defendant was found guilty on Indictment #6482 on October 23, 1981, and was sentenced to ten (10) years probation to run consecutively with the sentence imposed under Indictment #6480, and was fined the sum of One Thousand ($1,000.00) Dollars, payable at the rate of Ten ($10.00) Dollars per week beginning thirty (30) days after Defendant is released from confinement, said Judgment being signed November 3, 1981, and filed with the Clerk of the Court of November 6, 1981.

The Defendant being dissatisfied with the verdict and judgment in said case retained new counsel on approximately November 1, 1981, who filed a pleading entitled "Motion for New Trial and Bond" in this Cour on November 17, 1981, based upon the following grounds to wit:

1st because the verdict is contrary to evidence and without evidence to support it.

2nd because the verdict is decidedly and strongly against the weight of the evidence.

3rd because the verdict is contrary to law and the principals of justice and equity.

1.

Grounds Related Solely to Indictment #5480

(a) Defendant shows that the conviction on Indictment #6480 was without sufficient evidence to support it and that the Motion for Directed Verdict make by Defendant's counsel at the trial and denied by the Court (see T 205), should have been granted and Defendant hereby requests that the Court grant judgment notwithstanding the verdict on Indictment #6480. Defendant files the hereinafter listed enumerations subject to the Court's ruling on this his Motion for Judgment Notwithstanding the Verdict.

(c) The state has failed to prove that Defendant had possession of the allegedly stolen merchandise under Indictment #6480 in that others had equal access to the trailer in which said goods were found.

(d) The State has failed to prove that if Defendant possessed the allegedly stolen property under Indictment #5480, he did so with knowledge that it had been stolen by another.

(e) The testimony received from David Grnt and Bella Grant in connection with Indictment #6482 may not be considered in connection with Indictment #6480 inasmuch as the crimes are not sufficently similar crimes t allow the jury to infer motive, scheme or intent in one by belief of the Defendant's guilt in the other.

(f) The improper examination of Mrs. Pollard whereby, in the guise of questions, the State read from an alleged statement from the alleged burglar, which statements incriminated the Defendant, violated the confrontation caluse of the Sixth Amendment of the Constitution of the United States.

(h) The Court's failure to instruct the jury to disregard the testimony and evidence heard in connection with Indictment #6481, on which a directed verdict was granted, denied Defendant a fair trail as said testimony and evidence was left befor the jury for consideration.

(i) The introduction into evidence of property not alleged to be stolen and allowing same to go out with the jury with no instructions concerning same, denied Defendant a fair trial and allowed the jury to consider improper evidence.

(j) Defendant's conviction is contrary to law in that possession alone is not sufficient to support a conviction of theft by receiving, and circumstantial evidence is not sufficient.

Defendant requests that the Court grant his Motion forJudgment Notwithstanding the Verdict based upon insufficient evidence as to Indictment #6480 and refusing that, that the Court grant Defendant a new trial as to Indictment #6480 based upon the above-listed grounds, which actions are contrary to law and principles of justice and equity.

2.

Grounds Based Upon Charges Related to Indictment #6480

(a) The court failed to charge the jury concerning the equal access rule as it relates to possession of stolen prperty which failure was error in view of the evidence at trial and Defendnt was therby denied a fair trial in violation of the principles of ustice and equity.

(b) The charge of the Court was incomplete and misleading as it relates to the possession of stolen goods in that the Court states that the jury may consider other evidence to show guilty knowledge while not instructing the jury that they may not consider the evidence presented in connection with Indictment #6481 on which the Court had directed a verdict.

As a result of the errors in the charge of the Court listed above, the Defendant was denied a fair trial in violation of the principles of ustice and equity and under the laws of the Stae of Georgia.

(c) The improper examination of Mrs. Pollard outlined above necessarily prejudiced the ury against the Defendant as to Indictment #6482 and denied him a fiar trial as the principles of equity and justice require.

WHEREFORE, Defendant prays as follows:

(a) That the Court rule upn Defendant's motion for Judgment Notwithstandng the Verdict outlined above;

(b) That the Court grant Defendant a new trial as is required by equity, justice and the laws of the State of Georgia in the vent the Court rules against Defendant as to his Motion fo Judgment Notwithstanding the Verdict.

Respectfully submitted,

By: G. Alan Blackburn

Attorney for Defendant
JAMES KENNETH SELVIDGE
G. ALAN BLACKBURN

4205 Roswell Road, N.E.
Atlanta, Georgia 30342
(404) 256-3445

APPENDIX O

IN THE COURT OF APPEALS
STATE OF GEORGIA

APPEAL NO. 64723

JAMES KENNETH SELVIDGE,

Appellant

vs.

STATE OF GEORGIA,

Appellee

ENUMERATION OF ERRORS

COMES NOW JAMES KENNETH SELVIDGE, Appellant in the above captioned appeal, and pursuant to the Appellate Practice Act of 1965, as amended, Ga. Code Ann., § 6-810, and the rules of this Honorable Court, enumerates the following as errors committed in the trial of the above case in the Superior Court of Newton County, Alcovy Judicial Circuit, State of Georgia, in connection with Appellant's prosecution on three felony indictments, each charging theft by receiving stolen property.

The first alleged incident occurred on approximately June 12, 1980 and involved property belonging to Malcolm's Grocery, (Indictment #6481, hereinafter referred to as "MALCOLM"). A directed verdict of acquittal was rendered on MALCOLM at the close of the State's case.

The next alleged incident occurred on approximately December 1, 1980, and involved the PONY EXPRESS STOP AND GO, also known as POP BREEDLOVE'S place (Indictment #6482, hereinafter referred to as "BREEDLOVE"). Defendant was found guilty and judgment was entered against him.

The next alleged incident involved HAYES TRUCK AND TRACTOR, belonging to LEE HAYES, (Indictment #6480, hereinafter referred to as "HAYES"). Defendant was found guilty and judgment was entered against him.

All three indictments were tried jointly beginning October 22, 1981.

2.

The court erred in failing to grant Defendant's Motion For a Directed Verdict, (T-120), and subsequent motion For Judgment Notwithstanding The Verdict, and Motion For New Trial, (See Order Signed and filed March 25, 1982) in HAYES. Where the STATE's case was based upon circumstantial evidence which was insufficient to support a conviction, and the verict was contrary to law and the principles of justife and equity in the following particulars:

(a) The STATE failed to prove that the Defendant has possession of the allegedly stolen property where the *undisputed* evidence clearly showed that others had equal access and opportunity to commit the crime. (See 2(b) citations).

(b) The STATE presented only circumstantialk evidence of Defendant's guilt, and failed to exclude every reasonable hypothesis save that of the guilt of the Defendant, namely that the crime, if committed, could have been committed without the knowledge of the Defendant by Jay Flowers who resided with Defendant. (T.38, lunes 13-18; T.151, lines 7-19; T.185, line 18 through 186, line 24).

(f) . The STATE knowingly and intentionally introduced into evidence and allowed same to go out with the jury, property which was not alleged to have been stolen and belonged to Mr. J. C. Pollard and was turned over to him by the STATE subsequent to trial (See Motion For New Trial transcript, hereinafter MFNTT, 21-22, 28-35). This illegal evidence confused the jury as to the amount of property alleged to have been stolen and its value and operated to prejudice them against the Defendant.

(g) The testimony received from David Grant and Bella Grant in connection with BREEDLOVE could not lawfully be considered by the jury in support of the HAYES indictment inasmuch as the crimes are not similar, the parties are different and they are separate, unrelated incidences which occurred at different times. (T. 38-106, T.197-203). The court erred in directing the jury that it could consider this evidence. (T. 270, lines 12-24).

(h) The STATE failed to provide any evidence having probative value which would support anything other than the fact that the Defendant had possession of the goods alleged to have been stolen and possession alone is not sufficient to support a conviction of theft by receiving.

(i) The STATE violated the Defendant's Sixth Amendment right of confrontation of witnesses by reading to the jury the alleged confessin of an unindicted, non-present, nontestifying alleged accomplice tc the crime under the guise of impeaching the Defendant's grandmother. (T.161, line 12 ghrough T.167, line 8).

3.

The court erred in failing to grant Defendant's motions outlined above in both BREEDLOVE and HAYES, and Defendant was denied his right to a fair trial and to due process under the Fifth amendment for the following reasons:

(a) The court, after directing a verdict in MALCOLM, failed to instruct the jury to disregard any evidence they had seen or testimony they had heard in connection with MALCOLM and indeed instructed the jury that they could consider same. (T. 215, line 17, T. 270, lines 12 through 24).

(b) The STATE with full knowledge of the evidence it had on each of the charges improperly joined dissimilar indictments for trial while the Defendant, being without knowledge of the crimes, was without sufficient information and knowledge to make a knowing and meaningful decision whether or not to move for severance.

(c) The STATE improperly referred in closing argument to property not alleged to have been stolen (parking meter and bible), stating that these things prove the Defendant possessed stolen goods. (T.240, lines 12 through 25, T.241, lines 22 through 24).

(d) The District Attorney improperly argued that this non-evidentiary material proved that the Defendant retained the material without intent to restore it to the owner. (T/242, lines 8 through 9).

(e) The STATE in closing argument continued to argue the MALCOLM case upon which a verdict had been directed. (T.248, lines 16 through T.249, line 4).

(g) The STATE improperly sought to inflame the jury by arguing that the Defendant had been helping Flowers with his drug habit and helping him feed it. (T.258, lines 7-12).

(h) The STATE further improperly referred in closing argument to the alleged statement of the unindicted, non-testifying, non-present alleged HAYES accomplice. (T.239, lines 1 through 18).

(k) Defendant was denied a fair trial and due process of law by the cumulative conduct of the officers of the court whose duty it was to insure that the Defendant recieved a fair trial.

Respectfully submitted,

G. Alan Blackburn
G. ALAN BLACKBURN
Attorney for Appellant,
James Kenneth Selvidge

APPENDIX P

IN THE COURT OF APPEALS
STATE OF GEORGIA

APPEAL NO. 64723

JAMES KENNETH SELVIDGE,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

COMES NOW, JAMES KENNETH SELVIDGE, Appellant in the above-captioned Appeal, and within the time provided by law and pursuant to the provisions of *Rule* 48 of this Court, files this his Motion for Rehearing of the decision of this Court dated March 14, 1983, affirming the Judgment of the Superior Court of Newton County, denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial following his conviction for theft by receiving under Indictments No. 6480 and 6482, on each of the following grounds:

(1) The majority opinion is based upon patent misstatements of fact contained in the opinion, including the statement that Mr. flowers, whose "confession" was read to the jury testified live at the trial and the confessin was used to impeach him which he did not and which it was not; and

(2) The majority opinion has overlooked material and undisputed facts in the record; and

(3) The majority opinion has overlooked and failed to apply decisions which are controlling as authority and which would require a different Judgment from that rendered; and

(4) The majority opinion has erroneously construed and misapplied controlling authority.

ARGUMENT AND CITATION OF AUTHORITY

Rule 48(f) of this Court sets forth the basis used by the Court in granting a Motion for Rehearing. Measured by those standards, Appellant respectfully submits that this Motion should be granted on each of the grounds set forth above.

I. SUMMARY OF CASE

1.

The Appellant was tried on three (3) separate Indictments, each charging him with theft by receiving stolen property with a value of more than Two Hundred ($200.00) Dollars.

2.

The first Indictment charged the Appellant with receiving stolen property from a Hardware Store known as Hayes Truck and Tractor, the second with receiving property stolen from Malcolm's Grocery, and the third with receiving property stolen from a Convenience Store known as Pop Breedlove's.

3.

The Court granted Appellant's Motion for Directed Verdict of Acquittal on the Malcolm Indictment and the Jury found him guilty on the Hayes and Malcolm Indictments.

4.

This Appeal is from the denial of Appellant's Motions for Judgment Notwithstanding the Verdict and for New Trial, not merely from Appellant's Motion for New Trial as indicated in the majority opinion. (Majority Opinion Page 1, Paragraph 1).

II. CONFRONTATION ARGUMENT

1.

Enumeration of Error 2(i), shows that the State violated the Sixth Amendment Right of Confrontation of Witnesses by reading to the jury portions of an alleged confession by an alleged accomplice (Flowers) which accomplice was unindicted, was not present at the trial, and did not testify, and was not available for cross-examination, and there had been no prior opportunity for cross-examination by the Defendant of said person, in violation of *Bruton* v. *United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L. E. 2d 476 (1968).

2.

The majority opinion erroneously states at 3(c) "There was no error in allowing impeaching testimony from a statement made by the witness Flowers which was inconsistent with his in-court testimony." FLOWERS NEVER TESTIFIED! ! ! (See Index of transcript of trial).

3.

Appellant's grandmother was on direct examination and she was asked by defense counsel:

> "Question—Why is your son down at this drug treatment center?
>
> Answer—He said he was taking everything he could get his hands on.
>
> Question—Did the Court send him down there?
>
> Answer—Yes.
>
> Question—Was he involved in a robbery?
>
> Answer—He admitted it. He said he was the only one that was in it." (T 161 Line 19 through T 162 Line 2).

Mr. Flowers was never indicted, tried, or sentenced, for any crime related to a burglary at Hayes Truck and Tractor, which fact is undisputed. The District Attorney in cross-examination

of Appellant's grandmother then proceeds in the guise of cross-examination of the witness to hold in his hand and read therefrom portions of an alleged "confession" by Mr. Flowers concerning only the burglary at Hayes Truck and Tractor. After reading from the confession the State attempted to introduce same into evidence and stated its reasons therefore as follows: "What this statement is introduced for, is strictly to rebutt that statement and show prior inconsistencies." (T 166 Lines 1 through 5). The District Attorney could not possibly have assumed the witness was referring to the Hayes robbery when she said he had been sent to the drug center by the State and he had been involved in a robbery and he was the only one involved, in as much as he had not been indicted or tried for the crime to which he had allegedly confessed.

The cross-examination by the State went as follows:

"BY MR. STRAUSS:

Q—Let me see if I understand you correctly. You say that Jay Flowers told you that he was the only one that was involved?

A—He told me that his brother was not involved, it was only him.

Q—That's what he told you?

A—That's what he told me.

(Whereupon, State's exhibit number seventeen is marked for indentification.)

BY MR. STRUASS:

Q—Ms. Pollard, I know he was under arrest, Jay Mitchell Flowers, that is by Investigator Reed with the Sheriff's Department?

A—Yes, sir.

Q—You knew he gave a statement to the police?

A—I suppose he did.

Q—Does his statement to you, according to your direct testimony, was that he did it by himself; is that correct?

A—Many times more than once he told me that. He called his brother Barney, said, "Barney had nothing to do with it."

Q—Did he mention David Grant?

A—I don't remember if he mentioned David.

Q—I ask you whether or not he said, "Me and David Grant broke into it, we knocked the air conditioner out and took a lot of beer, fifteen dollars worth of beer and grabbed anything we could grab real quick." Did he ever say that David Grant was involved?

A—I knew he ran around with David, but I don't remember him saying that.

Q—All right. Did he ever tell you about his involvement in a burglary at that time, Hayes Truck and Tractors?

A—He told me that he did it.

Q—He said he did it. All right. Did he ever tell you quote how did you get the tools away? I took them to grandmother's house and I called my brother, he came down there, he knows they are stolen. He had to know where they came from. Investigator Reed asked him here they came from and he come and picked me up. I should have got more than I did, I know I left the bolt cutters, I know I left the door open, I was going to go back and try to wipe the prints off, but I didn't. I got the tools, I got two cardboard boxes and carried everything in two boxes, I carried on box at a time out of the building and my grandmother's house was only about fifty years from the building and I hid them in the bushes and I got a hold to my brother and he come down there and picked me up and took me to his house. Where are they now? At his house, as far as I know. Did he tell you bout the tools he stole?

A—He told Judge Stephenson he sold them to get drugs, that's all he told me about them.

Q—That might account for part of it, did he tell you he left part of the tools at James Selvidge's house?

A—No, he didn't.

Q—Ma'am, I think rather than my going through this, can you see all right, do you want to see if there is anything there that he did tell you?

THE COURT: While the witness is doing that, we are going to take a brief recess.

(Whereupon, the jury retires from the courtroom and a brief recess is held.)

CONTINUING RE-CROSS EXAMINATION

BY MR. STRAUSS:

Q—Ms. Pollard, during the recess, you have had an opportunity, I believe, to go over this statement and the waiver attached to it. Now, did he tell you everything that is stated in here?

A—No, he didn't." (T 162 Line 5 through T 165 Line 4).

Appellant has argued this point thoroughly in his original Brief at Page 26 and again in Appellant's Second Supplemental Brief and will not repeat his argument herein. The State contends that this technique is an appropriate method of impeaching the witness and rebutting her statements and that in any event Appellant has waived his right to raise this issue by not objecting at the time of trial. See Appellant's Second Supplemental Brief in this respect.

The Court's affirmation of the State's conduct in this matter was based upon the erroneous conclusion of fact that Mr. Flowers was available as a witness and in fact testified which he did not. If the State's argument is correct then there is no meaning to Bruton vs. United States, supra, in as much as any time there is a confession all the State has to do is paraphrase it's contents in the form of questions to a witness and the Jury will clearly have the message that a confession had been made

by someone involved in the case. The fact that the Court refused to allow the actual introduction of the confession is a further indication of the impropriety of the impeachment technique. It makes little difference whether the Jury reads the confession personally or observes the District Attorney reading it to a witness, the same improper prejudicial illegal information is injected into the trial in either event.

V. EQUAL ACCESS RULE

1.

The majority concluded and the record confirms that Appellant and Flowers both resided in the trailer titled in Appellant. (Majority Opinion, Page 1, Paragraph 2, Page 4, Paragraph 1).

2.

Appellant testified and the law presumes that Flowers a resident, had access to the property on which he resided. (Majority Opinion, Page 2, Paragraph 3). It is well established that the owner, lessee, or resident of real property is rebuttably presumably to be in possession of personal property located on the real property which is in control of any such party. *Mason* v. *State*, 146 Ga. App. 675, 247 S.E. 2d 121; *Bass* v. *State*, 140 Ga. App. 788, 232 S.E. 2d 98; *Mitchell* v. *State*, 150 Ga. App. 44, 256 S.E. 2d 652, and caes cited thereunder.

2.

The majority opinion indicates that no inference of ownership of any stolen goods found on the real property would apply against Flowers because there was no eivdence that Flowers had an ownership interest in the real property. Therefore, the majority opinion concludes the Equal Access Rule has no application because Flowers was merely a resident. (Majority Opinion, Page 4, Paragraph 1, Pages 4-5, Paragraph 1). The evidence is undisputed and indeed the Court has concluded that Flowers resided at the trailer titled in Appellant. The Equal Access Rule clearly applies where two persons reside at the same location, and the property is titled in one of the

parties, a rebuttable presumption of possession may lie against either resident. *Morris* v. *State*, 161 Ga. App. 141, 288 S.E. 2d 102.

3.

The majority opinion also incorrectly concludes that "The sole proprietor of the premises (Selvidge) is charged with knowledge of and possession of the stolen property which equally authorizes a finding by the Jury of receipt of stolen property" (Majority Opinion, Page 4-5, Paragraph 1). The preceding is an incorrect statement of the law, as no such charge exists. A rebuttable presumption of possession of personal property located on real property under the control of an owner, lessee, or resident exists under Georgia Law. *Mason* v. *State*, 146 Ga. App. 675, 247 S.E. 2d 121. In the instant case we have two residents occupying the same dwelling, one of whom has title. A rebuttable presumption of possession would rise against either such party. The majority opinion infers that equal access has no relevance in this case because "sole proprietorship" has been shown. (Majority Opinion Page 4-5, Paragraph 1). "Sole Proprietorship" is defined by Black's Law Dictionery as "A form of business in which one person owns all the assets of the business in contrast to a partnership and corporation. The sole proprietor is solely liable for all the debts of the business." "Sole Proprietorship" is a business term which has nothing to do with this case.

4.

It is not necessary to show that another party was the owner, lessee, or resident, of the subject real property in order to invoke the Equal Access Rule. The law merely requires that it be shown that there were others who had been on the premises frequently so as to have had equal access with Defendant to the stolen property. *Allen* v. *State*, 158 Ga. App. 691, 282 S.E. 2d 126. In the instant case, of course, the person having access was in fact a resident and more than just a mere visitor.

VI. HAYES CHARGE

1.

The court understated the fact when it concluded that "as to the burglary of Hayes Truck and Tractor, Grant was unable to shed much light on that crime." The fact is Grant knew absolutely nothing about that crime.

2.

The only evidence in the Hayes case was certain material which was found in the shed of the residence shared by Appellant and Flowers.

3.

At no time was the evidence found identified as the material from the Hayes burglary. The physical evidence in connection with the Hayes burglary consisted of State's exhibits nine through thirteen. Mr. Lee Hayes testified at T 112 Lines 14-20, T 120 at Line 19, T 121 Line 24, and T 123 Line 4, and never identified goods taken from Appellant's shed. In addition, the State identified and tendered physical evidence to the Court, which evidence was allowed to go out with the jury, which was not claimed to be stolen by any party, and in fact was the property of Defendant's grandfather, Mr. J. C. Pollard, specifically one red tool box marked as State's exhibit 9, one pair of red Fuller bolt cutters, and one gray Hess sockett wrench set identified as State's Exhibit 12. The above items were sent out with the Jury as stolen property and yet were returned to Mr. Pollard by delivering same to his attorney, Mr. Charles D. Strickland. (See Transcript of Motion for New Trial—Pages 21 through 22 which reads as follows: "The socket wrench set was the type being sold but Mr. Pollard claimed he had such a socket wrench. Now at the close of the evidence, Mr. Pollard having claimed his items and saying he owned these particular items, whose property it actually was, Mr. Jayes or Mr. Pollard, after discussion with the Deputy Sheriffs, we photographed all of the evidence, it was decided that the superior claim in absence that these might be Mr. Pollards, so they

released it." Although State's Exhibit's 9 through 14 were admitted without objection (See T 124 Line 22), the Court, on its own motion and without request from Defendant, made the following instruction to the jury on T 126 Line 22.

THE COURT:

"Let me make these instructions to the jury. These various tools were admitted in evidence, not as necessarily being the same tools that were taken from this witness's place of business. They may or may not be. They are offered in evidence and admitted in evidence as being tools like those that were taken and the Jury is to consider it accordingly. Allright Mr. Strickland?" No further evidence of ownership was introduced and there was clearly unsufficient evidence to establish ownership of the subject property.

4.

The State has not proved the guilt of Appellant beyond a reasonable doubt and its case relies upon circumstantial evidence. *Jackson* v. *Commonwealth of Virginia, et al.*, 443 U.S. 307, 61 L.E. 2d 560, 99 S.Ct. 2781, requires that where circumstantial evidence is relied upon to establish the guilt of the Defendant, such evidence must establish Defendant's guilt beyond a resonable doubt and must preclude every other reasonable hypothesis save that of the guild of the Defendant. In the instant case the evidence clearly does not rise to this level as the State has indeed shown that the material found at the reidence shared by the Defendant and Flowers was in fact stolen by Flowers, and under the law of a presumption of continuance, said goods would be presumed to continue to be in the possession of the thief until shown otherwise.

5.

The equal access argument and failure to possess with knowledge of the fact that the goods were stolen outlined above apply equally to the Hayes count.

CONCLUSION

For the reasons herein stated and on the authority cited, Appellant respectfully submits that his Motion for Rehearing should be granted and the decision of the Trial Court reversed.

Respectfully submitted,

Respectfully submitted,

G. Alan Blackburn
G. ALAN BLACKBURN
Attorney for Appellant,

4205 Roswell Road, N.E.
Atlanta, Georgia 30342
(404) 256-3445

APPENDIX Q

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. _____
COURT OF APPEALS OF GEORGIA
CASE NO. 64723

JAMES KENNETH SELVIDGE,
Defendant-Appellant,

VS.

STATE OF GEORGIA,
Appellee.

APPLICATION FOR WRIT OF CERTIORARI

G. Alan Blackburn
G. ALAN BLACKBURN
Attorney for Appellant
4205 Roswell Road, N.E.
Atlanta, Georgia 30342
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IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. _____
COURT OF APPEALS OF GEORGIA
CASE NO. 64723

JAMES KENNETH SELVIDGE,
Defendant-Appellant,

vs.

STATE OF GEORGIA,
Appellee.

APPLICATION FOR WRIT OF CERTIORARI

COMES NOW, JAMES KENNETH SELVIDGE, Defendant, in the above-styled action, who files this his Application for Writ of Certiorari within the time and in the manner provided by law from:

(1) The Judgment of the Court of Appeals dated March 14, 1983, affirming the Judgment of the Superior Court of Newton County, denying the Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial following his conviction for theft by receiving under Indictments Number 6480 (Hayes) and 6482 (Breedlove), as follows, four (4) judges concurred in Judge Birdsong's opinion, Chief Judge Shulman and Presiding Judge Deen concurred in the Judgment only, Judge Carley concurred in part and dissented in part (as to the Hayes conviction), and Judge Banke dissented and wrote a dissenting opinion; and

(2) From the Judgment of the Court of Appeals dated March 30, 1983, denying Appellant's Motion for Rehearing, and substituting a new page 6 in the Majority Opinion, and adding Judge Carley's written dissent as to the conviction in Hayes, with all other votes being the same as above outlined.

Copies of the adverse Judgments of the Court of Appeals are attached hereto as Exhibits "A" and "B" respectively. Notice of Intention to Apply for a Writ of Certiorari was timely filed with the Clerk of the Court of Appeals of Georgia on April 4, 1983.

The questions raised in this Appeal are of great concern, gravity and importance to the public and involve the following:

(1) Factual errors which form the basis for the Majority Opinion which errors of fact include the following:

(a) That Mr. Flowers, whose "confession" was read to the jury, was present and testified as a witness and was thus available for cross-examination by the Defendant. *See* both the original and amended Majority Opinion which refer to "Witness Flowers." A review of the trial transcript shows clearly that Mr. Flowers did not testify as a witness, and was not available for cross-examination.

(c) Judge Carley's concurrence in the Breedlove holding is based on the erroneous conclusion that Defendant Selvidge was convicted of burglary in the Breedlove matter. *See* concurring opinion of Judge Carley in which he states "I agree with the majority that Grant's testimony was sufficient to support Appellant's conviction of that burglary. Defendant Selvidge was charged with theft by receiving, and if the evidence was sufficient to support a conviction for burglarly, then the evidence could not possibly support a conviction for theft by receiving.

(a) The Defendant's right of confrontation of witnesses under the Sixth Amendment to the Constitution of the United States is violated where the State during cross-examination of Defendant Selvidge's grandmother read excerpts from a "confession" directly naming Defendant Selvidge as being a principal in the Hayes burglary, which "confession" by Flowers could not be gone into by Defendant Selvidge as to the truth of the contents, and Mr. Flowers was not present and did not testify live and was not subject to cross-examination.

The only evidence of any type which was introduced in connection with the Hayes charge was the allegedly stolen tools found in the shed of the trailer to which Mr. Flowers, as well as Defendant Selvidge, without dispute, had equal access. Other than the identification witness Mr. Hayes, there was no other evidence directly connecting Defendant Selvidge with the Hayes' burglary. The State has not proved the guild of Appellant beyond a reasonable doubt in this a circumstantial evidence case, contrary to the requirements of *Jackson* v. *Commonwealth of Virginia, et al.*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560, which requires that where circumstantial evidence is relied upon to establish the guilt of the defendant, such evidence must establish defendant's guilt beyond a reasonable doubt and must preclude every other reasonable hypothesis save that of the guilt of defendant. In the instant case the evidence clearly does not rise to this level as the State has indeed failed to exclude the hypothesis that Flowers alone stole the goods without knowledge of Defendant Selvidge. The "confession" of Flowers, which was read by the District Attorney, was not evidence and has no probative value. If the State indeed wanted to connect Defendant Selvidge with the Hayes case, they could readily have called Flowers as a witness and failed to do so.

APPENDIX R

O.C.G.A. § 24-10-92, formerly Ga., Code 1933 § 38-2003a, provides, as is herein pertinent, as follows:

> "(a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person within this state is a material witness in such prosecution or grand jury investigaton, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which the person is found, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.
>
> (b) If at a hearing the judge determines that the witness is material and necessary,—he shall issue a summons,—directing the witness to attend and testify in the cour where the prosecution is pending. . . ."'

APPENDIX S

he didn't." And then question, "All right, do you want to see if there is anything there that he did tell you?" And then at that point the Court took a recess and Ms. Pollard, apparently reviewed the statement, then when the Court reconvened, this is continuing re-cross examination, question, "During the recess, you had an opportunity, I believe to go over the statement and waiver attached to it, now did he tell you everything that is stated in there?" And her answer is, "No, he didn't." Question, "He didn't tell you all these things?" And answer, "No, but when my grandson made—he said he would get even with him and I think he has now." At that point they go into trying to get the document admitted, Mr. Strickland objected on hearsay, confession of another, and the Court did not allow the document to go in.

Now, I submit, your Honor, that it is improper, I think violates a confrontation right if you wanted to get Mr. Flowers to testify where he would be exposed to cross examination, it would be all right, he could have done so. I don't think it is appropiate or proper to use this kind of circumstance to try

THE COURT: What are your other points, Mr. Blackburn, how do you wish with respect to this statement, you tender that as part of the record?

MR. BLACKBURN: Yes, I would like it in as part of the record as well as D five which we have identified, which is a receipt for material that was specified at the trial which subsequently returned to the grandfather, Mr. Pollard. I understand tha Mr. Strauss has no objection with it coming in with explanation as to what his contentions are.

THE COURT: What coming in?

MR. BLACKBURN: D five, which is the receipt for the material returned to Mr. Pollard.

MR. STRAUSS: Perhaps I should address that matter. Let me state in my place the record might be foggy. Whether this document being tendered is or is not a statement of Jay Mitch-

ell Flower, it was represented to me and there was, as far as I am concerned, some sort of factual basis for the question. There may not have been factual basis for the line of questioning. This was given to me by Dale Reed during the trial, if the Court may remember, whether it was useful

Now, taking as a whole, your Honor, the Hays case does not meet the burden set down in Jackson versus Commonwealth of Virginia which requires we have a circumstantial evidence case and still must prove guilt beyond a reasonable doubt. I don't think the proof offered in this case as to Hays meets that standard argument in that as far as the Breedlove burglary the argument is they got him charged with the wrong crime, but as to Hays, the evidence is just purely insufficient, we move for a judgment notwithstanding the verdict, in lieu of that we ask for a motion for new trial on both cases. We also would like, while we are here, to have a brief motion hearing, if we can, as to bond which I just have two witnesses after Mr. Strauss.

MR. STRAUSS: Very briefly, your Honor, let me work backwards if I may. Since the cases were all tried together, no request for severance was made by defense counsel, and it would have been proper to have asked for it. I don't see why a jury would not have been authorized under the facts of this case to consider the testimony of David Grant with
or not, I did not know. The second point, with defendant's five, I want to make sure the Court understands that this is nothing more than a return for certain items, I will make sure the Court understands that this is nothing more than a return for certain items, I will mention what they are, red battered toolbox, exhibit nine, and a pair of *old* bolt cutters, exhibit fifteen, socket wrench, as state's twelve, also another item, a certain rifle. Mr. Pollard claimed these items, now for the convenience of the parties,as the Court is well aware, those items were individual to some extent and had some relation to trial. The bolt cutters were, being the type sold at the store belonging to Mr. Hays, though Mr. Pollard claimed they were his. The red box which we allege came from Hays, was nothing more than a container, Mr. Pollard sai it was his. The reason it was sent out

is th tools were found in the box when the deputies found it, and was searched. The *socket wrench set was the type being sold*, but Mr. Pollard claimed he had such a socket wrench. Now, at the close of the evidence Mr. Pollard, having claimed his items and saying he owned these particular items, whose property it actually was, Mr. Hays or Mr. Pollard, after discussion with the deputy sheriffs, we photographed all the evidence, it was decided that the *superior claim* in the absence that these might be *Mr. Pollard's*, so they released it. I had no further need, that is not—this is not meaning necessarily we made any determination or an admission that they belonged to Mr. Pollard, all it was was clearing out of evidentiary group of items held intially as evidence. It was the best way and most expeditious way under the circumstances. I don't mean to say it was Mr. Pollard's or Mr. Hays.

THE COURT: What is the State's position on the admission of those two documents?

MR. STRAUSS: Well, your Honor, I am not sure they will be helpful one way or the other. So much of the document, whch is defendant's four that—and I assume that's been compared to the transcript—has even been brought to the jury's attention, was not part of the trnascript already whether Mitchell Flowers, as the Court asked, I am not sure if that is helpful because the rest of the information was not made. Ms. Pollard read that and said she didn't know any of the

he didn't." And then question, "All right, do you want to see if there is anything there that he did tell you?" And then at that point the Court took a recess and Ms. Pollard, apparently reviewed the statement, then when the Court reconvened, this is continuing re-cross examination, question, "During the recess, you had an opportunity, I believe to go over the statement and waiver attached to it, now did he tell you everything that is stated in there?" And her answer is, "No, he didn't." Question, "He didn't tell you all these things?" And answer, "No, but when my grandson made—he said he would get even with him and I think he has now." At that point they go into

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MR. STRAUSS: Very briefly, your Honor, let me work backwards if I may. Since the cases were all tried together, no request for severance was made by defense counsel, and it would have been proper to have asked for it. I don't see why a jury would not have been authorized under the facts of this case to consider the testimony of David Grant with

IN THE SUPERIOR COURT OF NEWTON COUNTY
STATE OF GEORGIA

BURGLARY

STATE OF GEORGIA

v.

JAMES KENNETH SELVIDGE

The above-entitled matter came on for hearing befor the Honorable Greeley Ellis, Judge, Alcovy Judicial Circuit, commencing onMarch 23, 1982.

APPEARANCES OF COUNSEL:

For the State: JOHN T. STRAUSS, D.A.

For the Defendant: ALAN BLACKBURN, Esq.

MR. BLACKBURN: Well, I think it is inappropriate to use that type of statement for the manner in which it was used. I think it is inapprpriate to mislead a jury in thinking there is a statement which, in fact, there has been no authentication of it.

THE COURT: It was not admitted in evidence, was it?

MR. BLACKBURN: No, your Honor, it was kept out because it was hearsay and prejudicial, but I submit to the Court it is just as prejudicial to hear the material being read as it is to read it in the jury room.

THE COURT: You can use a statement made by a defendant without having been given any Miranda rights for purposes of impeachment.

MR. BLACKBURN: That's correct, and if Mr. Flowers were on trial, that's correct. Mr. Selvidge was on trial.

THE COURT: That's correct. All the more reason it should be usable in this case. If there is any contest about which case,

it would be more usable in this because Mr. Flowers is not on trial. All the witness has to do is tell the truth and there have been many many shreud techniques employed by counsel on cross examination to determine whether or not the witness is telling the truth, and I am suggesting to yo that as a technique of cross examination I have got serious doubts it makes any difference whether it is a statement by Jay Flowers or not. Now, I grant you there may be certain circumstances in which representation by the State would be improper if it were knowingly made to give the false impression to the jury as to a matter of proof as to what is in the statement, but when it is used only in an attempt to cross examine and impeach the witness, I have got serious doubt it makes any difference whatever.

MR. BLACKBURN: Well, your Honor, this type question has been raised by the United States Supreme Court in Berger versus The United States, 55 Supreme Court which is—

THE COURT: What is your cite on that?

MR. BLACKBURN: 55 Supreme Court, which your Honor has a copy of in the material I have provided to the Court.

THE COURT: What does it say?

MR. BLACKBURN: In that case, for example, the case was reversed and one of the problems was

APPENDIX T

GEORGIA, NEWTON COUNTY
IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors selected, chosen and sworn for the County of Newto to-wit:

I, Sam Ramsey, Foreman; (2) Hollis Blackshear; (3) Helen Knight; (4) Arthur Mae Jefferson; (5) John Wayne Cody; (6) Carole C. Doster; (7) Jean Burton; (8) Gail Bayes; (9) Johnny Blackshear, Jr.; (10) Judy Allen; (11) Henry Hollingsworth; (12) Weston M. Brown; (13) Marshall R. Elizer; (14) Joe W. Allgood; (15) Frank Castellana; (16) T. M. Ewing; (17) R. A. Maddox; (18) Isaac Henderson; (19) Harold J. Ayers; (20) Robert Lee Hurst, Sr.; (21) Connie W. Knight; (22) Jannie Bell Hammonds; (23) Georgia Anderson.

In the name and behalf of the citizens of Georgia, charge and accuse James Kenneth Selvidge with the offense of Theft by Receiving Stolen Property, Felony for that the said James Kenneth Selvidge on the 13th day of June, in the year Nineteen Hundred and eighty 80 in the County aforesaid, did then and there, unlawfully did receive stolen property, to-wit: Walkies Talkies, cigarettes, beer and miscellaneous food tiems, the property of Pop Breedlove, d/b/a Pony Express Stop & Go, Newton County, Georiga, with a value of more that $200.00, knowing said property was stolen, said property not having been received with intent to restore it to the owner.

FILED OPEN COURT
This 8th day of Oct., 1981
MILDRED B. LORD, CLERK
Newton County Superior Court
Alcovy Circuit

Contrary to the laws of said State, the good order, peace and dignity thereof.

Newton Superior Court

October Term, 1981

W. A. Reed
Prosecutor.

John T. Strauss
District Attorney
SPECIAL PRESENTMENT

APPENDIX U

GEORGIA, NEWTON COUNTY
IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors selected, chosen and sworn for the County of Newton to-wit:

I, Sam Ramsey, Foreman; (2) Hollis Blackshear; (3) Helen Knight; (4) Arthur Mae Jefferson; (5) John Wayne Cody; (6) Carole C. Doster; (7) Jean Burton; (8) Gail Bayes; (9) Johnny Blackshear, Jr.; (10) Judy Allen; (11) Henry Hollingsworth; (12) Weston M. Brown; (13) Marshall R. Elizer; (14) Joe W. Allgood; (15) Frank Castellana; (16) T. M. Ewing; (17) R. A. Maddox; (18) Isaac Henderson; (19) Harold J. Ayers; (20) Robert Lee Hurst, Sr.; (21) Connie W. Knight; (22) Jannie Bell Hammonds; (23) Georgia Anderson.

In the name and behalf of the citizens of Georgia, charge and accuse James Kenneth Selvidge with the offense of Theft by Receiving Stolen Property, Felony for that the said James Kenneth Selvidge on the 24th day of January, in the year Nineteen Hundred and eighty 81 in the County aforesaid, did then and there, unlawfully did receive stolen property, to-wit: assorted Hess and SK tools, Fuller bolt cutters and other various tools, the property of Lee Hays, doing business as hays Truck & Tractor, 116 N. Maine Street, Mansfield, Newton County, Georgia, with a value of more than $200.00, knowing said property was stolen, said property not having been received with intent to restore it to the owner.

FILED OPEN COURT
This 8th day of Oct., 1981
MILDRED B. LORD, CLERK
Newton County Superior Court
Alcovy Circuit

Contrary to the laws of said State, the good order, peace and dignity thereof.

Newton Superior Court

October Term, 1981

W. A. Reed
Prosecutor.

John T. Strauss
District Attorney
SPECIAL PRESENTMENT

NO. 83-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES KENNETH SELVIDGE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the Petitioner's allegations of alleged constitutional and evidentiary errors where the Supreme Court of Georgia did not address, under either federal or constitutional law, any of the allegations raised but instead decided the Petitioner's case solely as a question of state law?

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TABLE OF AUTHORITIES

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PART ONE

STATEMENT OF THE CASE

Petitioner, James Kenneth Selvidge, was convicted on two counts of theft by receiving stolen property,

a violation of O.C.G.A. § 16-8-7; Ga. Code Ann. § 26-1806. On appeal to the Court of Appeals for the State of Georgia, the Petitioner's convictions and sentences were confirmed at Selvidge v. State, 166 Ga. App. 80, 303 S.E.2d 294 (1983).

Petitioner then sought, and was granted, a writ of certiorari to the Supreme Court of Georgia, which upheld the Court of Appeals' affirmance of Petitioner's convictions. Selvidge v. State, 252 Ga. 243, 313 S.E.2d 84 (1984).

Petitioner now seeks a writ of certiorari from this Court to review the affirmance of his convictions and sentences by the Supreme Court of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. NO ISSUE IS PRESENTED FOR REVIEW BY THIS COURT BECAUSE THE SUPREME COURT OF GEORGIA IN THE INSTANT CASE DID NOT ADDRESS ANY OF THE ALLEGATIONS RAISED HEREIN UNDER EITHER FEDERAL OR CONSTITUTIONAL LAW, BUT INSTEAD DECIDED THE PETITIONER'S CASE SOLELY AS A QUESTION OF STATE LAW.

Petitioner contends that his Sixth and Fourteenth Amendment rights were violated during his trial, and that under Georgia law, insufficient

circumstantial evidence was presented to support his conviction. Respondent submits that no issue raised by the Petitioner was addressed by the Supreme Court of Georgia under either federal or constitutional law, but instead the Petitioner's case was decided solely as a question of state law.

It is a well-established principle of law that this Court will not decide federal or constitutional issues raised for the first time on review of a state court's decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Such questions not raised below are very likely to have an inadequate record, since it was certainly not compiled with those questions in mind and in the federal system it is very important that the

state courts be given the first opportunity to consider the application of state statutes in light of any constitutional challenge. Id. at 439.

Additionally, this Court has consistently adherred to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935). In explanation of this policy, this Court has said:

> The reason is so obvious that it has rarely been thought to warrant statement. It is

found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

In the instant case, the Supreme Court of Georgia, in its review of the Petitioner's case, limited its review solely to the question of whether the testimony of David Grant, the burglar of Breedlove's Store and the principal witness against the Petitioner on the "Breedlove's" count, required corraboration under O.C.G.A. § 24-4-8; Ga. Code Ann. § 38-121. Selvidge v. State, 252 Ga. 243, 244, 313 S.E.2d 84 (1984). This sole issue considered by the Supreme Court of Georgia, upon which the writ of certiorari is sought, is neither presented nor discussed in the instant petition. Additionally, the Supreme Court of

Georgia's decision regarding Petitioner's case was based solely on the court's interpretation of Georgia statutes, and did not identify or discuss any federal or constitutional issue.

Although the Petitioner did allege a violation of his Sixth Amendment right to confrontation of witnesses in his direct appeal to the Court of Appeals for the State of Georgia, this issue was not discussed by the Supreme Court of Georgia. The Court of Appeals for the State of Georgia did not address this issue under any federal or constitutional aspect, but instead stated:

> There was no error in allowing impeaching testimony in a statement made by the witness Flowers to a police

officer which was inconsistent with what he reputably (sic) said to his grandmother in her in-court testimony, especially in the absence of an objection or motion to strike.

Selvidge v. State, 166 Ga. App. 80, 84, 303 S.E.2d 294 (1983). Not only had the Court of Appeals for the State of Georgia not addressed any federal issue in considering this alleged error, but it is also apparent that the court's interpretation of state law and trial procedure influenced its decision on this issue.

Regarding Petitioner's allegations that his Fourteenth Amendment rights were violated by the introduction of certain items into evidence, this issue was not raised in the context of

a constitutional violation in the Petitioner's direct appeal to the Court of Appeals for the State of Georgia. See Petitioner's Appendix O, page 68a, no. 2(f). This issue was not expressly addressed or decided by either the Court of Appeals or the Supreme Court of Georgia in their respective decisions.

Additionally, Petitioner's allegations that his co-conspirator's out of court statement was improperly used as circumstantial evidence against the Petitioner at his trial fails to raise any federal or constitutional issue. In his argument regarding said allegations, Petitioner fails to identify any federal or constitutional issue, but instead alleges violations of Georgia state law. See Petition for Writ of

Certiorari, pages 12-14. The Court of Appeals for the State of Georgia did not directly address this allegation, but instead generally stated that:

> There is sufficient circumstantial evidence, as supported by other direct evidence, to warrant a jury finding of guilt beyond a reasonable doubt.

Selvidge v. State, 166 Ga. App. at 84. The Supreme Court of Georgia did not address this issue at all.

As both the Supreme Court and the Court of Appeals for the State of Georgia did not address any of the Petitioner's allegations raised herein in either a federal or constitutional context, but instead reviewed the Petitioner's allegations solely in light of adequate and independent

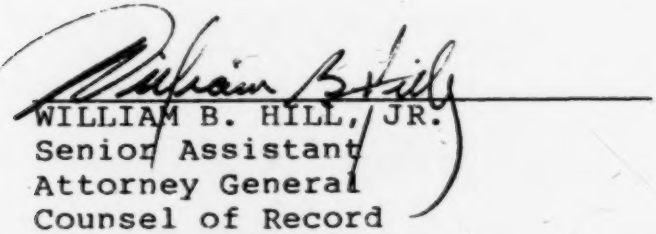
non-federal grounds, Respondent respectfully submits that the issues raised in the instant petition for certiorari are improperly developed and presented to this Court for review.

Therefore, for all of the above and foregoing reasons, Respondent asserts that Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there exists no federal question for review by this Court as to the Petitioner's claims, and, further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,



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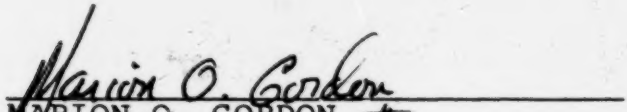

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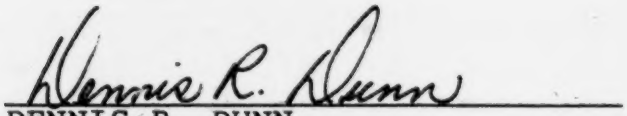

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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR. a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

G. Alan Blackburn
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(Additional service on next page)

and to:

Honorable John T. Strauss
District Attorney
Alcovy Judicial Circuit
Newton County Courthouse
Covington, Georgia 30209

This 5th day of June, 1984.

/s/

WILLIAM B. HILL, JR.